86-498

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

IRVIN W. GILMORE,

Petitioner,

vs.

LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the double jeopardy provisions of the United States Constitution preclude trial where the defendant, with the consent of the prosecution, enters a plea of guilty to one count of a multi-count information where the plea thus tendered is unequivocally accepted by the trial court and later vacated by the Court *sua sponte*, notwithstanding the fact that said plea was voluntarily and intelligently made and is not otherwise constitutionally infirm.

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In The

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October Term, 1986

IRVIN W. GILMORE,

Petitioner,

vs.

LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this matter on June 27, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the

Third Circuit dated June 27, 1986, whose judgment herein is sought to be reviewed, is reported at *Gilmore v. Zimmerman*, No. 85-1650, United States Court of Appeals for the Third Circuit, ____ F.2d ____ (3d Cir. 1986). The prior opinions of the United States District Court for the Eastern District of Pennsylvania are reported at 619 F. Supp. 859 (E.D. Pa. 1985).

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1986. A timely petition for reargument before the Court of Appeals was filed and denied by order dated July 27, 1986. Jurisdiction of the United States District Court was invoked pursuant to 28 U.S.C. § 2241. Jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 2253. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. The Fifth Amendment of the United States Constitution which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation on indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the militia, which in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself;

nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The first section of the Fourteenth Amendment of the United States Constitution which provides as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges on immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 28 U.S.C. § 2241(a) which provides as follows:

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

STATEMENT OF THE CASE

A. Procedural History

This matter was initially commenced in the state courts by the filing of the Criminal Complaint charging the petitioner with Criminal Homicide, 18 Pa. Cons. Stat. Ann. § 2501; Aggravated

Assault, 18 Pa. Cons. Stat. Ann. § 2702; and Recklessly Endangering Another Person, 18 Pa. Cons. Stat. Ann. § 2705. After various pretrial proceedings, the petitioner entered into an agreement with the prosecution whereby he would enter a plea to the offense of involuntary manslaughter with the remaining charges to be dismissed. An agreement was reached as to the sentence the prosecution would recommend. Thereafter, with a full colloquy, the petitioner tendered the guilty plea as aforesaid and the plea was unequivocally accepted by the court. By agreement among the prosecution, petitioner and court, the sentence to be recommended was not put on the record at the time that the guilty plea was accepted. After the plea was accepted, the court was recessed with directions that a pre-sentence investigation be prepared and sentencing deferred. The petitioner was called for sentencing on February 28, 1983, at which time the recommendation as to sentence was placed on the record by the prosecuting attorney and the consent of the prosecuting police officers noted. Upon consideration of the recommendation, the trial judge advised the petitioner that he would not sentence in accordance with the plea bargain. The court advised the petitioner that he was entitled to withdraw his plea, or that he could stand on his plea as entered, but if he did so, he would be subject to any sentence which the court might impose within the permissible range fixed by the legislature. After consulting with his counsel, petitioner chose to stand on his plea. Petitioner's counsel so advised the court and requested that the court proceed with sentencing. At that time, the court without stating any reasons on the record, vacated petitioner's guilty plea and ordered the matter for trial.

Contending that the actions of the trial court were improper, the petitioner filed a motion with the trial court requesting the pending complaint be dismissed. Said petition asserted that by the court having accepted the petitioner's guilty plea, the petitioner stood convicted of the offense to which he had pleaded guilty and that further prosecution would violate the double jeopardy

provisions of the United States and Pennsylvania Constitutions. That petition was dismissed by the trial court and a timely appeal taken to the Superior Court of Pennsylvania. The trial court's decision was affirmed therein, and a petition for allowance of appeal was filed with and denied by the Pennsylvania Supreme Court. Thereafter, a petition for writ of habeas corpus was filed in the United States District Court for the Eastern District of Pennsylvania. Since all the matters complained of by the habeas corpus petitioner were matters of record, the petitioner's application was decided without taking further evidence. The Honorable Daniel J. Huyett, 3rd, denied the petitioner's request for relief by memorandum and order dated October 10, 1985, *Gilmore v. Zimmerman,* 619 F. Supp. 859 (E.D. Pa. 1985). A timely appeal was taken to the Third Circuit Court of Appeals who issued a certificate of probable cause for appeal and a stay of the pending state court proceedings. After brief and argument, the Court of Appeals entered the judgment and opinion from which the petitioner seeks review herein.

B. The Evidence

Petitioner was charged with Criminal Homicide, Aggravated Assault and Recklessly Endangering Another Person. After the preliminary hearing, the petitioner was held for court on the above charges and was arraigned at which time a plea of not guilty was entered. After exercising his rights of pretrial discovery and after a hearing and adjudication of his pretrial motions, the petitioner entered a plea of guilty on January 10, 1983. Said plea of guilty was to one count of Involuntary Manslaughter and was premised on the basis that the petitioner, due to exhaustion and consumption of alcohol lacked any clear recollection of the events which gave rise to the charges. Nonetheless, having had an opportunity to examine the Commonwealth's evidence and having had an opportunity to consult fully with his counsel, the petitioner being duly advised of his rights, entered a plea of guilty. The plea thus

tendered was entered in accordance with this Court's decision in *North Carolina v. Alford,* 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160, and its Pennsylvania counterpart, *Commonwealth v. Cottrell,* 249 A. 2d 294 (1969).

On February 28, 1983, the petitioner having been called for sentencing, the plea bargain entered into prior to the entry of the guilty plea was put on the record. At that point, the trial judge advised the petitioner that he would not sentence in accordance with the plea bargain and gave the petitioner the option to be sentenced on an open plea or to move for withdrawal of his negotiated plea. After consultation with his counsel, the petitioner decided to stand on the plea as entered and requested that the court proceed with sentencing. Thereafter, the court attempted to question the petitioner regarding a certain statement he allegedly made to a police officer. At that point, defense counsel objected to the relevance of the question and the court precipitously struck the plea and listed the matter for trial. Thereafter, the petitioner's counsel advised the court that the petitioner was not refusing to answer any questions and requested an opportunity to confer with the petitioner. Nonetheless, without giving the petitioner or his counsel the opportunity to confer, court was adjourned.

C. Rulings Below

The petitioner's double jeopardy contentions were raised in the trial court in the state proceedings and the trial judge held that although jeopardy protection had attached when the plea was accepted by the court, vacating the plea was nonetheless justified. The court apparently based its conclusion on its belief that the plea, as tendered, lacked an adequate factual basis. Although failing to clearly articulate the reasons which would permit a second prosecution of petitioner, the court held the termination of the first prosecution to be proper. The trial court concluded that the petitioner's failure to expressly admit guilt

rendered the factual basis for the plea inadequate, and thus rendered the plea defective.

On appeal, the petitioner contended that a plea accepted by the court could be vacated by the court only upon the motion or with the consent of the defendant unless such action was manifestly necessary to protect the defendant from an involuntary plea. Further, the petitioner contended that mere lack of a factual basis did not render a plea of guilty constitutionally infirm and that the factual basis herein was adequate. The Superior Court of Pennsylvania affirmed, basing their judgment essentially on the opinion below. *Commonwealth v. Gilmore,* 479 A. 2d 624 (Pa. Super. 1984).

The petitioner then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, in the United States District Court for the Eastern District of Pennsylvania.

The District Court held that the petition was properly before it because of the "special circumstances" which exist in this case, namely, that forcing the petitioner to stand trial would defeat the constitutional right which he seeks to preserve, *Gilmore v. Zimmerman,* 619 F. Supp. 859 (E.D. Pa. 1985) at 681. The District Court agreed with the petitioner that jeopardy attached when the guilty plea was accepted by the court. Although questioning its validity, the District Court considered itself bound by the precedent established in *United States v. Jerry,* 487 F. 2d 600 (3d Cir. 1973). The District Court also held that the *sua sponte* vacating of a guilty plea would preclude further prosecution on jeopardy grounds unless such action was manifestly necessary. The court did not conclude, as the petitioner urged, that the manifest necessity which would warrant the striking of a guilty plea without the consent of the defendant must be based on a constitutionally defective plea. It was the contention of the petitioner that the mere lack of a factual basis did not render an otherwise voluntary

and intelligent guilty plea constitutionally infirm and thus any purported lack of factual basis did not justify the actions of the trial court. The District Court did not address the issue, but rather concluded that the factual basis was inadequate and that the trial court was justified. The District Court failed to explain how the purported lack of a factual basis justified the *sua sponte* striking of a voluntary and intelligent guilty plea accepted by the court pursuant to *Alford, supra.*

The issues thus framed, relief was sought in the Court of Appeals. The brief and argument therein centered on the circumstances, if any, under which jeopardy, once attached, could "unattach" and permit trial. The Court of Appeals, however, held that there had been no attachment of jeopardy to the entry of the guilty plea. The court based its conclusion on this Court's decision in *Ohio v. Johnson,* 467 U.S. 493, 81 L. Ed. 2d 425 (1984), and on its belief that the interests that the double jeopardy clause protects would not be offended by trial in the within matter. The court reasoned that the petitioner is not threatened with successive prosecutions, *Gilmore v. Zimmerman,* 85-1650, United States Court of Appeals for the Third Circuit, ____ F. 2d ____ (3d Cir. 1986).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to clarify the principles enunciated in this Court's decision as to the time when jeopardy attaches in the context of a guilty plea and to resolve conflicts in that connection among lower courts. Additionally, the grant of the writ is necessary because the application of the principles enunciated by the Court of Appeals will serve to severely undermine the system of negotiated pleas. The Court of Appeals' opinion interprets *Johnson, supra,* as having eviscerated a line of cases in the various courts of appeals which have held that jeopardy attaches upon acceptance of the guilty plea by the court.

United States v. Jerry, 487 F. 2d 600, 606 (3d Cir. 1973); *United States v. Felton,* 753 F. 2d 276, 278 (3d Cir. 1985); *United States v. Hecht,* 638 F. 2d 651, 657 (3d Cir. 1981); *United States v. Young,* 503 F. 2d 1072, 1074 (3d Cir. 1974); *United States v. Cambindo Valencia,* 609 F. 2d 603, 637 (2nd Cir. 1979); *United States v. Sanchez,* 609 F. 2d 761, 762 (5th Cir. 1980); *United States v. Bullock,* 579 F. 2d 1116, 1118 (8th Cir.); *United States v. Vaughan,* 715 F. 2d 1373, 1378 (9th Cir. 1983).

The court interpreted *Johnson, supra,* to stand for the proposition that jeopardy never attaches to all counts of a multi-count information by a plea of guilty to some of the charges. If, indeed, the Court of Appeals' application of *Johnson, supra,* is correct, then one must conclude that *Johnson, supra,* was intended to overrule this Court's opinion in *Brown v. Ohio,* 432 U.S. 161, 53 L. Ed. 2d 187 (1977). The petitioner contends that had the *Johnson* Court deemed it appropriate to overrule *Brown, supra,* it would have done so. Rather, the *Johnson* Court distinguished *Brown, supra,* with the following observation:

> "We do not believe, however, that the principles of finality and prevention of prosecutorial overreaching applied in Brown reach this case. No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. Here respondent offered only to resolve part of the charges against him, while the state objected to disposing of any of the counts against respondent without a trial. Respondent has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the state had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. The

> acceptance of a guilty plea to lesser included offenses charged on the greater offenses remain pending, moreover, has none of the implications of an 'implied acquittal' which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses . . . . There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the state its right to one full and fair opportunity to convict those who have violated its laws . . . ." *Johnson, supra,* 407 U.S. at 501-02; *Gilmore v. Zimmerman,* 85-1650, United States Court of Appeals for the Third Circuit, ____ F. 2d ____ (3d Cir. 1986).

Clearly the potential for prosecutorial overreaching and the acquiescence of the prosecution are critical factors to consider if one is to determine the attachment of jeopardy to a guilty plea to less than all charges of a multi-count indictment. Inexplicably, the Court of Appeals considered the consent of the prosecution an inconsequential factual difference, *Gilmore v. Zimmerman,* 85-1650, United States Court of Appeals for the Third Circuit, ____ F. 2d ____ (3d Cir. 1986), page 15, note 2, and made no attempt whatsoever to analyze the potential for prosecutorial overreaching.

Where the defendant in a criminal case agrees to plead guilty to some counts of a multi-count indictment in return for the prosecution's agreement to dismiss the balance of the charges and where the defendant follows through on his agreement and in fact enters a plea which is accepted by the court, he is entitled thereby not to face trial on the balance of the charges. *Cf., Santobello v. New York,* 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed.

2d 427 (1971). If he must face the other charges, there has been prosecutorial overreaching, intentional or otherwise. Thus where a negotiated plea has been entered by a defendant to less than all counts of a multi-count indictment, prosecutorial overreaching is inherent if trial is permitted on counts to which a guilty plea was not entered. The petitioner submits that a clear rule emerges from *Brown, supra,* and *Johnson, supra; i.e.,* where a guilty plea is entered to less than all counts of a multi-count indictment with the consent of the prosecution then jeopardy attaches as to all counts when the plea of guilty is accepted by the court. In this case, there is more than mere passive consent on the part of the prosecution. The Assistant Attorney General who represented the Commonwealth in this case, along with the police prosecutors actively negotiated and fully endorsed the entry of the petitioner's guilty plea. The petitioner contends that the rule which emerges from *Johnson, supra,* and *Brown, supra,* is implicit therein, but that disagreement among the Circuits, confusion in the lower courts and uncertainty among litigants will prevail until the rule is stated explicitly.

Not only is the issue raised herein important to the petitioner, but the attachment of jeopardy to a guilty plea to less than all counts of a multi-count indictment is of critical importance in virtually every negotiated plea. This Court has recognized the importance of the negotiated plea in the administration of criminal justice and has encouraged plea bargaining. *Santobello, supra.* As a practical matter, the essence of a plea bargain involves an agreement by the defendant to plead guilty in return for concessions by the prosecution as to charges and/or sentence. This Court has held that the defendant is entitled to the benefit of his bargain, *Santobello, supra.* It is essential that the defendant's counsel be in a position to assure the defendant that the proposed guilty plea will end the matter finally and forever. Under the Court of Appeals' formulation, no such assurance would be accurate. Never having been tried or sentenced on the charges to which

a guilty plea had not been entered, the defendant would remain exposed to further prosecution. Not being assured of the "*quid pro quo*" of his plea of guilty, the defendant would be ill-advised to waive the myriad rights he waives by pleading guilty. The petitioner respectfully submits that the *Johnson* Court did not intend to seriously undermine the negotiated plea, nor is any such result necessarily implied in *Johnson, supra*. Nevertheless, if the consent of the prosecution is irrelevant, as the Court of Appeals has held, then the plea bargain will assume a significantly less important role in the administration of criminal justice. If such a profound change in the administration of justice is, in the opinion of this Court, constitutionally warranted, the petitioner submits that such a fundamental deviation from the current plea negotiating system should be explicitly stated by this Court. If, on the other hand, negotiated pleas are constitutionally sound and are to be encouraged, then this Court should grant the writ sought by the petitioner.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

EMMANUEL H. DIMITRIOU
Attorney for Petitioner

APPENDIX A—DENIAL OF PETITION FOR REHEARING DATED JULY 29, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1650

GILMORE, IRVIN W.,

Appellant

vs.

ZIMMERMAN, LEROY, Attorney General for the Commonwealth of Pennsylvania

---

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*
LONGOBARDI, *District Judge**

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in the regular active service, and no judge

---

* Honorable Joseph J. Longobardi, United States District Judge for the District of Delaware, sitting by designation.

Appendix A

who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Stapleton
Circuit Judge

Dated: July 29, 1986

APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 27, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1650

GILMORE, IRVIN W.,

Appellant

vs.

ZIMMERMAN, LEROY, Attorney General
for the Commonwealth of Pennsylvania

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSLYVANIA
(D.C. Civil No. 85-2490)

Argued: April 28, 1986

Before: SLOVITER and STAPLETON,
Circuit Judges, and
LONGOBARDI, District Judge*

(Opinion Filed: June 27, 1986)

EMMANUEL H. DIMITRIOU (Argued)
P.O. Box 677
522-24 Court Street
Reading, PA 19603

Attorney for Appellant

---

* Honorable Joseph J. Longobardi, United States District Court for the District of Delaware, sitting by designation.

Appendix B

CHARLES P. MACKLIN, JR. (Argued)
Senior Deputy Attorney General
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1600 Strawberry Square
Harrisburg, PA 17120

Attorney for Appellee

OPINION OF THE COURT

STAPLETON, *Circuit Judge*

Appellant, Dr. Irwin Gilmore, challenges the propriety of a state trial judge's *sua sponte* decision to vacate appellant's plea of guilty to a charge of involuntary manslaughter and to order him to stand trial for murder. Appellant contends that the Double Jeopardy Clause precludes the court from subjecting him to trial after his guilty plea was accepted.

Appellant commenced the instant action by filing a petition for habeas corpus in the district court. Appellant appeals from the denial of relief. We have jurisdiction pursuant to 28 U.S.C. § 2253, and have previously issued a certificate of probable cause and stayed the pending state proceedings. We now affirm.

I.

At 8:00 a.m. on November 27, 1980, appellant, a medical doctor, awoke and discovered his wife dead beside him in bed. The previous evening they had attended a Thanksgiving eve party, accompanied by their son and daughter-in-law. Appellant and his son had retired at 12:30 a.m., while appellant's wife and daughter-in-law had retired at approximately 2:00 a.m.

The medical evidence indicated that the decedent had died due to a lethal combination of alcohol and

meperidine, a drug. The evidence further indicated that she had suffered several bruises to her head and face, that she had been injected with meperidine four to six times at two separate site areas in her right buttock, and that the location of the injections suggested that it was unlikely that the injections were self-administered.

After his wife's death, appellant made several self-incriminating statements to law enforcement officials regarding his wife's death. As a result, in June of 1981, appellant was charged with criminal homicide, aggravated assault, and recklessly endangering another person.

Appellant eventually entered a plea of guilty to the lesser included offense of involuntary manslaughter. The trial court conducted a lengthy and detailed plea colloquy, during which the prosecuting attorney outlined the factual basis for the plea:

> [O]n the morning of November 28th, 1980, the decedent wife of the defendant, Patricia Gilmore, was discovered dead in her bed. A later examination at the Reading Hospital..., together with toxicology examinations..., revealed that the decedent had received multiple injections of a drug known as meperidine. In addition, the blood alcohol level of ... the decedent was .23 which we recognize as being way above the legal definition of intoxication in Pennsylvania. It was the conclusion of [three experts] that the cause of death was the combination of alcohol and meperidine, exact causes of death being poisoning by alcohol and meperidine.
>
> The level of the meperidine in the blood system of the decedent was 2.9 micrograms per milliliter. It does fall within the range of known fatal dosage, and based on that blood alcohol level and the state

of medical knowledge known at the time, it was the conclusion of all of the Commonwealth witnesses and experts who would appear at trial, they would conclude that the cause of death was meperidine poisoning together with the alcohol.

Your Honor, in connecting the defendant with the cause of death, the Commonwealth would produce testimony, which would be statements made by the defendant to Chief Harley Smith, Muhlenberg Township Police, and Trooper Barrie Pease; and those statements would show that the defendant was drinking aloholic beverages a short time prior to the death, that the decedent was drinking alcoholic beverages, and further, that theB defendant made a statement to Trooper Pease that he gave the defendant (sic) injection or injections of a vitamin and meperidine. Further questioning of the defendant by Chief Harley Smith, the defendant denied at all times that he gave the defendant (sic) any injections.

It is the statement made to Trooper Pease that he gave the injection, together with the denial made to Chief Harley Smith and the absence of any other explanation as to the injections being received by the decedent that the Commonwealth brought the charges against the defendant.

If the Court please, based upon the state of the defendant's condition, that of intoxication together with his not denying at this time that he gave the injections, the Commonwealth will accept a plea to the charge of involuntary manslaughter.

Plea of Guilty, January 10, 1983, A-499-501.

The defense attorney then offered his comments on the statement of facts given by the prosecution:

Appendix B

> Your Honor, if it please the Court, I have reviewed this matter with Dr. Gilmore. I understand that he understands that the statements made by [the prosecuting attorney]... are those which the Commonwealth would tend to prove at and would attempt to prove at the time of trial.
>
> I would like to state for the record that the evidence would show that in fact Dr. Gilmore and his wife were at a party the night before, that he had consumed intoxicating beverages, that he was extremely physically exhausted at the time, that he recognizes the possibility that he may have injected meperidine in accordance with the statement which has been admitted by the Court.
>
> I would further like to state for the record that although Dr. Gilmore is not denying -- or let me correct that. The statement as set forth by [the prosecuting attorney] ... that at this time he is not denying should be elaborated upon in this respect: That he is stating he has no recollection of injecting his wife with meperidine or any of the acts related to this incident as a result of his consumption of alcohol and the physical exhausation at the time.
>
> He is entering his plea because he has concluded, after advice from counsel, that it would be to his best interests to enter the plea of guilty to involuntary manslaughter.

Id. at A-501-02.

In response to the court's questioning, the parties advised that the following plea bargain agreement had been reached:

> Your Honor, we have agreed that a pre-sentence report should be obtained and ordered and directed by the Court, that the pre-sentence report should include a full psychiatric and physical examination of the defendant and that based upon that pre-sentence report, the Commonwealth will make a recommendation at the appropriate time.

Id. at A-505.

The court then advised the defendant that it was not bound by the plea agreement or any recommendation the prosecutor might make but could enter any sentence within the range for involuntary manslaughter previously set forth. Before concluding, the court explained to appellant each of the rights he was giving up by pleading guilty.

Finally, the court accepted appellant's guilty plea:

> THE COURT: Dr. Gilmore, I am satisfied that after the foregoing discussion that you do desire to enter a plea of guilty to the charge of involuntary manslaughter and I am convinced that you are doing this with full understanding of the consequences and that you are doing this freely and voluntarily. I will therefore allow you to enter a plea of guilty to the charge of involuntary manslaughter.
>
> [DEFENSE ATTORNEY]: Your Honor, if I may, so that the record is clear, I would like the record to reflect that I have advised Dr. Gilmore that the state of the law, as the Court knows and as we have reviewed it, is that he can enter a plea of guilty without admitting guilt and it's based on the reasons that I have already spread upon the record, the Court's rulings on our pretrial motions, the fact that he does not have a recollection and that he has concluded, with my advice, that it is to his

best interest to waive a jury trial or a trial before a judge and to proceed with the guilty plea of involuntary manslaughter.

THE COURT: Yes. I would re-emphasize that, Dr. Gilmore. We have reviewed the cases with counsel for the Commonwealth and with your counsel and we are satisfied under [*Commonwealth v. Cottrell*, 249 A.2d 294 (1969)] ... which is still good law, that in a case where there is significant evidence of guilt and where you, after adequate consultation with your lawyer, decide to plead guilty to a charge, that your plea is not rendered invalid merely because you are unable or unwilling to detail the occurrence in court or merely because you are unable to remember or have a recollection of what occurred. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand further that you will not be able to come back later and say, "I don't recall what happened and therefore my guilty plea should not be taken." Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You will be bound by the entry of this plea notwithstanding the fact that you say you have no recollection of what happened at the time involved. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Very well. I will allow the guilty plea to be entered.

A 513-15.

On February 28, 1983, the parties appeared before the court for sentencing on the plea. The

Commonwealth, indicating that it most likely would not be able to obtain a jury verdict higher than involuntary manslaughter, recommended a fine of $10,000 and a five-year sentence of probation with community service in lieu of imprisonment.

The court rejected the prosecutor's recommendation. It permitted appellant to choose between standing on the plea, in which case the court indicated it would "sentence in accordance with the law" as it deemed proper, or withdrawing the plea and standing trial. A-524. Appellant chose to stand on his plea. The court then stated that there were "some important factors that ... [he] should understand." A-525. This colloquy followed:

> THE COURT: Dr. Gilmore, Trooper Pease has stated in his report that you admitted to him that you gave your wife vitamin B-12 and meperidine. Do you recall making that statement to him, or do you deny making it to him, or do you admit making it to him?
>
> [DEFENSE ATTORNEY]: Your Honor, if it please the Court, I have advised Dr. Gilmore that in line with the plea as we have entered it, I don't think that those matters are relevant at this time. We have entered a plea on the record. We have stated our position on the record, and I do not believe that it's appropriate to develop into anything else other than what is pertinent at this time, which is the sentence.
>
> THE COURT: Well, then that makes it very easy.... Then in accordance with Rule 320 of the Rules of Criminal Procedure, the guilty plea is struck off. A not guilty plea is entered for the defendant, and he will stand trial. Trial is fixed for March the 21st, 1983.

[DEFENSE ATTORNEY]: If it please the Court, before the Court proceeds, I'd like to know why the Court is taking the position that he's taking, and I would like to confer with Dr. Gilmore. I've merely stated my position. THAT DOESN'T MEAN THAT HE WOULD NOT RESPOND.*

THE COURT: ... there are too many unanswered questions in this whole matter, and therefore, I think the appropriate procedure is that the matter go to trial, and that's why I struck the guilty plea.

[DEFENSE ATTORNEY]: Your Honor - - -

THE COURT: Court is adjourned.

A-525-26.

In March, 1983, appellant sought and obtained a change of venue. Two months later appellant moved to dismiss the proceedings on double jeopardy grounds. The trial judge denied appellant's motion on June 3, 1983, and in September of that year issued an opinion explaining his decision to vacate the guilty plea.

In that opinion, the court found "an inadequate factual basis to support the defendant's equivocal guilty plea." Revised Opinion at 6. The court found that it should accept an equivocal guilty plea only in the presence of "strong evidence" of guilt, and only after taking "special care" to determine whether there is a factual basis. The court then concluded that the record lacked a sufficient factual basis to support appellant's plea. "On the record of this case," the court observed, "the defendant may well have attempted to plead guilty, not because he believed himself to be guilty or that the Commonwealth could prove him guilty, but because he was fatigued, afraid and depressed, and to avoid the physical and mental rigors of a trial." *Id.* at 7. The court concluded, "there are simply too many unanswered questions. Accordingly, our proceeding

under Pa. R. Crim. P. 320[1] in which we struck off the guilty plea and substituted a not guilty plea in its stead, was not an abuse of our discretion." *Id.* at 8.

The Superior Court of Pennsylvania affirmed on June 22, 1984, and the Supreme Court of Pennsylvania denied appellant's Petition for Allowance of Appeal on March 25, 1985.

The district court held that jeopardy had not "attached irrevocably" when appellant's guilty plea was accepted, and that the guilty plea could be vacated if there was "manifest necessity for such action." *Gilmore v. Zimmerman*, 619 F.Supp. 859, 864 (E.D. Pa. 1985). Because the district court agreed with the trial court that there was an insufficient factual basis to support appellant's plea, it found the trial court's actions justified by manifest necessity.

II.

In *Ohio v. Johnson*, 467 U.S. 493 (1984), Johnson, indicted for offenses ranging from murder to grand theft, pleaded not guilty to murder and aggravated robbery but offered to plead guilty to the lesser included offenses of involuntary manslaughter and grand theft. The trial court accepted the guilty pleas over the state's objection, and then dismissed the remaining charges on double jeopardy grounds. The Supreme Court held that Johnson could, consistent with the Double Jeopardy Clause, be prosecuted for the more serious offenses.

The Court reiterated the "three basic protections" of the Double Jeopardy Clause:

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1. Pennsylvania Rule of Criminal Procedure 320 provides:

Rule 320. Withdrawal of Plea of Guilty

At any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.

> "'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'"

467 U.S. at 498, *quoting Brown v. Ohio*, 432 U.S. 161, 165 (1977), *quoting North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The Court rejected Johnson's argument that the double jeopardy prohibition against multiple prosecutions barred his trial on the greater offenses after he pleaded guilty to the lesser included offenses. The Court stated:

> The answer to this contention seems obvious to us. Respondent was indicted on four related charges growing out of a murder and robbery. The grand jury returned a single indictment, and all four charges were embraced within a single prosecution. Respondent's argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now.

467 U.S. at 500-01.

The Court distinguished *Brown v. Ohio*, *supra*. In that case, the State first charged defendant with joyriding and, after defendant pleaded guilty to and was sentenced for that offense, indicted him again for auto theft. Finding that joyriding was a lesser included offense of auto theft and that both charges were "the

same offense" for purposes of the Double Jeopardy Clause, the *Brown* Court held the subsequent prosecution barred. The *Johnson* Court stated:

> We do not believe, however, that the principles of finality and prevention of prosecutorial overreaching applied in *Brown* reach this case. No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. Here respondent offered only to resolve part of the charges against him, while the State objected to disposing of any of the counts against respondent without a trial. Respondent has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses.... There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws....

Johnson, 407 U.S. at 501-02 (citations omitted).

Faced with circumstances similar to those presented in *Johnson*, we ourselves reached precisely

the same result in *United States v. Goldman*, 352 F.2d 263 (3d Cir. 1965). Goldman was tried on two charges contained in a single indictment. Midway through trial, the trial court permitted Goldman, over the prosecution's objection, to plead guilty to the lesser included offense. Goldman then objected on double jeopardy grounds to further trial on the pending claim, of which he was nevertheless convicted.

We affirmed, finding that the case presented "no issue of successive trials ... such as characterizes many controversies over double jeopardy." 352 F.2d at 266. We said:

> We are concerned merely with the continuation of a single trial until the completion of litigation on both counts of an indictment. If both counts have gone to the jury simultaneously and guilty verdicts had been returned on both, the one arguable contention would have been that the penalty should not exceed that permissible for the greater offense.... We do not see that the situation differs significantly here merely because a change of plea in mid-trial established guilt on one count at an earlier stage of that trial than did the subsequent jury verdict on the other. The accepted plea of guilty on one count was not a judgment.... Rather, the disposition of both charges was completed later by a single judgment.... [N]either logic nor fairness requires that consecutive determinations in a single trial on two charges growing out of a single transaction be regarded as within the concept of harassment by repetitious litigation constituting double jeopardy. As concerns the harassment problem, Goldman's trial in its entirety was but a single occasion of jeopardy.

Id. at 266 (citations omitted).

Similarly, in *United States v. Combs*, 634 F.2d 1295 (10th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981), the defendant was charged in a two-count indictment with bank robbery and bank larceny. Defendant pleaded guilty to the latter charge, and then moved, unsuccessfully, to dismiss the former charge on double jeopardy grounds.

On appeal, the Tenth Circuit treated the offenses as greater and lesser included offenses. However, the court concluded:

> [because] acceptance of the plea and the trial constituted only one criminal prosecution, we find no violation of the guarantee against successive prosecution.

Id. at 1298.

Finally, *United States v. Schuster*, 769 F.2d 337 (6th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1210 (1986), is to the same effect. The defendant in that case was convicted for engaging in a continuing criminal enterprise after he had pleaded guilty to charges of conspiracy to import and distribute marijuana. He challenged the former conviction on double jeopardy grounds. The Sixth Circuit held that the charges of which defendant was convicted were the same for double jeopardy purposes. Nevertheless, citing *Johnson*, *Goldman* and *Combs*, the court found that appellant had not been subject to successive prosecutions.

We believe these precedents control this case. Like *Johnson* and *Goldman*, this case involves a single prosecution, not successive ones. Like the defendants there, appellant pleaded guilty to a lesser included offense while a more serious charge remained pending. If Johnson and Goldman could be thereafter prosecuted in the same proceeding on the more serious

offense, we perceive no reason why appellant cannot be prosecuted for murder in the same proceeding.[2] The fact that his plea was stricken obviously puts him in no better position than that of a defendant whose plea remains intact. These precedents teach that the interests protected by the Double Jeopardy Clause's prohibition against sucessive prosecutions for the same offense simply are not implicated in the situation currently before us.

As the *Johnson* Court noted, the Double Jeopardy Clause also protects against multiple punishments. This did not help Johnson:

> [B]efore respondent can ever be punished for the offenses of murder and aggravated robbery he will first have to be found guilty of those offenses. The trial court's dismissal of these more serious charges did more than simply prevent the imposition of cumulative punishments; it halted completely the proceedings that ultimately would have led to a verdict of guilt or innocence on these more serious charges. Presumably the trial court, in the event of a guilty verdict on the more serious offenses, will have to confront the question of cumulative punishments as a matter of state law, but because of that court's ruling preventing even the trial of the more serious offenses, that stage of the prosecution was never reached. While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit

2. We recognize that in *Johnson* and *Goldman*, unlike this case and *Schuster*, the prosecution urged the court not to accept the tendered pleas. From the standpoint of the defendant and those interests of his protected by the Double Jeopardy Clause, however, this seems to us a factual difference which should have no legal significance.

> the State from prosecuting respondent for such multiple offenses in a single prosecution.

467 U.S. at 499-500.

Similarly, appellant's right to be free from multiple punishment is not presently threatened and there is no reason to expect that it will ever be. Unlike Johnson, who wound up with two convictions, appellant's prosecution will at most result in only one.

Appellant's contention that the protections of the Double Jeopardy Clause attached when his guilty plea was accepted rests on *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973) and its progeny. *See United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985); *United States v. Hecht*, 638 F.2d 651, 657 (3d Cir. 1981); *United States v. Young*, 503 F.2d 1072, 1074 n.5 (3d Cir. 1974). *See also United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2nd Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980); *United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); *United States v. Vaughan*, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983).

However, *Jerry* and its progeny are either distinguishable from or consistent with our holding. *Jerry* itself held that a defendant who by his own motion causes his guilty plea to be withdrawn has waived any right not to be put in jeopardy a second time. *Hecht* involved reinstatement of a guilty plea that was improperly vacated over defendant's objection. *Sanchez* held that a defendant could be tried for the greater offense after the trial court *conditionally* accepted but then ultimately rejected defendant's guilty plea to the lesser included offense. Similarly, in *Bullock*, the tendered guilty plea was never accepted. Finally, *Felton*, *Young* and *Cambindo Valencia* support the proposition that a defendant whose first

indictment is resolved by his guilty plea may not be tried for the same offense on a later indictment. None of these cases held that double jeopardy bars further prosecution on a single, multiple-count indictment after a guilty plea to a lesser included offense is accepted.

Appellant relies most heavily on the following observation of the court in *Jerry*:

> Jerry must be considered to have been convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him, and jeopardy therefore attached with the acceptance of his guilty plea by the district court.

487 F.2d at 606. It is true that this statement, coming as it did in the context of a case involving a single prosecution, is inconsistent with the result we here reach. As we have noted, however, it represents only an assumption made by the court in the course of reaching a holding altogether inapposite here. More importantly, whatever value it may retain in other contexts, in light of *Ohio v. Johnson*, it can no longer be read to suggest that double jeopardy interests are implicated in a case like this. Similar observations can be made concerning the two other cases upon which appellant relies most heavily, *United States ex rel Metz v. Maroney*, 404 F.2d 233 (3d Cir. 1968), *cert. denied*, 394 U.S. 949 (1969), and *United States v. Cruz*, 709 F.2d 111 (1st Cir. 1983). Both of these appeals challenged, on double jeopardy grounds, a trial court's vacation of a defendant's guilty plea over the defendant's protest. Both involved single prosecutions and both, drawing analogies to the caselaw permitting retrial after certain mistrials, held that continued prosecution following vacation of a guilty plea did not violate the Double Jeopardy Clause in the

circumstances before them. The holdings of *Metz* and *Cruz* are thus consistent with ours. Both courts assume, however, that double jeopardy protected interests were implicated in a single prosecution situation and rested their holdings on findings that "manifest necessity" justified vacation of the pleas. We believe the assumption of the *Metz* and *Cruz* courts, like that of the *Jerry* court, is inconsistent with *Ohio v. Johnson*.

III.

Appellant is not threatened with successive prosecutions and the Double Jeopardy Clause offers him no relief from the order of the trial court that he stand trial on the most serious charge in the indictment against him. Consequently, the order of the district court denying relief will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C—MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 10, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 85-2940

IRVIN W. GILMORE

v.

LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania

MEMORANDUM AND ORDER

HUYETT, J. October 10, 1985

Petitioner Irvin W. Gilmore filed this petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2241 seeking to enjoin a state criminal proceeding pending against him. After reviewing Gilmore's petition, Magistrate Leomporra recommended that the petition for writ of *habeas corpus* be denied and dismissed without an evidentiary hearing. Judge Leomporra's Report and Recommendation was filed on August 27, 1985.

After reviewing the Magistrate's Report and Recommendation, petitioner's objections, and the circumstances giving rise to this petition, I agree with the Magistrate's conclusion that the petition for writ of *habeas corpus* must be denied; I do not, however, entirely, accept the Magistrate's analysis. On

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September 6, 1985, counsel for petitioner, Emmanuel H. Dimitriou, filed petitioner's objections to Judge Leomporra's Report and Recommendation and requested that I make a *de novo* determination as to the issues presented in the petition for writ of *habeas corpus.*

The facts giving rise to the petition are as follows. On June 19, 1984, a criminal complaint was issued against petitioner Gilmore and he was charged and arrested for criminal homicide, 18 Pa. Cons. Stat. Ann. § 2501; aggravated assault, 18 Pa. Cons. Stat. Ann. § 2702; and recklessly endangering another person, 18 Pa. Cons. Stat. Ann. § 2705. On October 21, 1984, an information was filed. Gilmore waived arraignment and on October 23, 1981 a plea of "not guilty" was entered on his behalf.

On January 10, 1983 petitioner Gilmore appeared before President Judge Forrest Schaeffer of the Court of Common Pleas of Berks County, and entered a plea of guilty to involuntary manslaughter. Judge Schaeffer engaged in a fairly detailed colloquy with petitioner Gilmore and his counsel on that date to ensure that petitioner understood the nature of the charge of involuntary manslaughter and the rights which he was waiving by entering a guilty plea. Judge Schaeffer also heard from Mr. Haddad on behalf of the Commonwealth who outlined for the court the factual basis for the charges brought against the petitioner. Throughout the colloquy, petitioner, through his counsel, reiterated that he was not admitting his guilt and that he had no recollection of injecting his wife with the fatal dose of meperidine.

As of January 10, 1983, no plea agreement had been entered into between the Commonwealth and Gilmore. At best there was a report by counsel to Judge Schaeffer that plea discussions were underway. Mr. Haddad told the court that the Commonwealth

would make a recommendation as to an appropriate sentence after obtaining a psychological and medical examination of petitioner. Judge Schaeffer then stated that he would accept petitioner's plea and order a presentence report.

The colloquy before Judge Schaeffer resumed on February 28, 1983. At that time, Mr. Haddad set forth the terms of the plea bargain, and stated that the Commonwealth would accept a plea to involuntary manslaughter and the Commonwealth would recommend a sentence of probation plus the maximum fine of $10,000. Judge Schaeffer, upon hearing the Commonwealth's position, stated that he would not accept the plea bargain. He then gave petitioner the choice between permitting the plea to be an open plea thereby permitting the Judge to sentence him in accordance with the law as he deemed proper or withdrawing his guilty plea. Petitioner, after consulting with his attorney, decided to stand on the plea as previously entered. Judge Schaeffer then proceeded to ask petitioner Gilmore several qustions based on inconsistent statements Gilmore had allegedly made to two police officers and which were the basis of the Commonwealth's evidence against Gilmore. Petitioner's counsel objected to the line of questioning whereupon Judge Schaeffer ordered the guilty plea withdrawn and ordered petitioner to stand trial. In his written opinion, Judge Schaeffer held that there had been an insufficient factual basis for him to accept the plea and it was for this reason that he had ordered the plea withdrawn.

Petitioner Gilmore contends that Judge Schaeffer's actions in withdrawing his guilty plea and ordering him to stand trial violate the constitutional prohibition against double jeopardy. Gilmore claims that Judge Schaeffer accepted his guilty plea and that jeopardy attached to the guilty plea so that he may not now be tried for the crimes with which he was originally charged. In

his Report and Recommendation, Judge Leomporra concluded that jeopardy had not attached; he based his conclusion on two alternative grounds. First, he concluded that jeopardy had not attached because petitioner had not yet been put to trial: no jury had been empanelled nor had the court started to hear evidence. In the alternative, Judge Leomporra, relying upon *Klobuchir v. Commonwealth of Pennsylvania,* 639 F.2d 966 (3d Cir.), *cert. denied,* 454 U.S. 1031 (1981), held that Gilmore had never been in jeopardy of being convicted of murder because he entered a guilty plea to involuntary manslaughter; therefore there was no double jeopardy violation. Petitioner has filed objections to both grounds of the Report and Recommendation.

Petitioner filed his petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2241. Generally, federal *habeas corpus* is a remedy which is available only post-conviction. Exceptions have been made, however, where "special circumstances" exist, and as Judge Leomporra concluded "special circumstances" exist in this case because forcing petitioner to stand trial would defeat the constitutional right he seeks to preserve. *U.S. ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975). Neither party has raised any objection to the conclusion that a federal court properly may entertain petitioner's double jeopardy claims in a federal *habeas* petition at this time, and I will, therefore, approve and adopt this aspect of the Report and Recommendation.

Petitioner's first objection pertains to the inference created in the Report and Recommendation that jeopardy never attaches to a plea. The Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ." At some point, the constitutional protection against double jeopardy must attach to a guilty plea; otherwise, a defendant could be subject to

punishment for the same offense twice. Following a guilty plea, punishment is usually as imminent and inevitable as after a conviction by a jury. In *United States v. Jerry,* 487 F.2d 600, 606 (3d Cir. 1973), the court held that the defendant "must be considered to have been convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him and jeopardy attached with the acceptance of his guilty plea by the district court." Therefore, to the extent that the Report and Recommendation implies that jeopardy may never attach to a guilty plea, it must be rejected.

The Magistrate held in the alternative that jeopardy never attached because Gilmore was never faced with the possibility of being convicted for murder. In support of this conclusion, the Magistrate relied upon *Klobuchir v. Commonwealth of Pennsylvania,* 639 F.2d 966 (3d Cir.), *cert. denied,* 454 U.S. 1031 (1981), in which the court held that the double jeopardy clause did not bar the state from retrying the defendant on the original first degree murder charge after his plea was withdrawn. The *Klobuchir* court concluded that when the trial judge accepted the defendant's guilty plea to third degree murder, he could not have considered any greater charge, and therefore the defendant was never in jeopardy of being convicted of first degree murder. An important distinction between *Klobuchir* and the present case is that in *Klobuchir,* the defendant had moved post-conviction for relief from his guilty plea while in this case Judge Schaeffer vacated or ordered the withdrawal of petitioner's guilty plea over his objections. in *Klobuchir*, there was no question that the defendant could be retried for the lesser offense to which the defendant had entered a plea, *i.e.,* third degree murder; jeopardy had not attached to the lesser offense. Rather, the question was whether he could also be tried for the higher offense, and the court held that he could be. In this case, the question petitioner is raising is essentially

whether he could even be tried for the lesser offense for which he entered a guilty plea, *i.e.* whether jeopardy attached to the plea of guilty of involuntary manslaughter.[1]

Petitioner contends that Judge Schaeffer unconditionally accepted his plea on January 10, 1983, that jeopardy attached to that plea, and that Judge Schaeffer's order striking the plea and setting the case for trial violated his fifth amendment protection from further prosecution. Petitioner further contends that a judge is permitted to vacate a guilty plea only in extreme circumstances, and those circumstances did not exist in this case. In this way, petitioner analogizes the vacation of a guilty plea over the objection of the defendant to the declaration of a mistrial when the defendant objects.

As previously noted, the court in *United States v. Jerry,* 487 F.2d 600 (3d Cir. 1973) held that jeopardy attaches to a guilty plea which is accepted.[2] The questions left open after *Jerry* and

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1. If I were to conclude that jeopardy had attached because the plea had been irrevocably accepted and could not be properly vacated, the appropriate remedy would be to reinstitute the guilty plea. *See United States v. Hecht,* 638 F.2d 651 (3d Cir. 1981).

2. Without elaborating or citing any legal authority, the *Jerry* court concluded that jeopardy attaches with the acceptance of the guilty plea by the district court. 487 F.2d at 606. As the court in *United States v. Cruz,* 709 F.2d 111, 113 (1st Cir. 1983) noted, no court has analyzed in depth the application of double jeopardy to a guilty plea, and it has not been clear why the *Jerry* court chose the acceptance of a guilty plea as the point at which jeopardy attaches rather than the entry of judgment. I note too that there is confusion in the case law as to what constitutes acceptance.

The earliest case to address the issue of attachment of jeopardy to a guilty

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which are raised by the present case are what constitutes acceptance

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plea which I have found is *Raidon v. United States,* 274 F.2d 304 (6th Cir. 1960). Drawing an analogy to *Green v. United States,* 355 U.S. 184 (1957), in which the court emphasized that it is not essential that a verdict of guilty or innocent be returned for a defendant to have been placed in jeopardy, the *Raidon* court concluded that a plea of guilty puts the accused in jeopardy. The *Raidon* court, however, did not address the issue of when jeopardy attaches.

Following the lead of the *Raidon* court, the court in *United States v. Barbosa,* 224 F. Supp. 628 (D. P.R. 1963) held that jeopardy attached to defendant's guilty plea. Defendant Barbosa had pled guilty to taking by force and violence on a federal reservation a purse containing $60. Barbosa's plea was accepted by the court but sentencing was postponed pending the receipt of a presentence report. Before sentencing, the indictment was dismissed because a second, identical indictment had been returned by the grand jury. The court concluded that because the plea established defendant's guilt and there remained only the formality of entering judgment of conviction and the imposition of sentence, jeopardy had attached. *Id.* at 630. The *Barbosa* court therefore suggested that jeopardy attaches at the time of the acceptance of the plea, but there was no discussion as to what constitutes acceptance.

Courts, since *United States v. Jerry* have followed the *Jerry* court's lead and have held that jeopardy attaches with the acceptance of the guilty plea, but little thought has been given to why this should be the rule or to what constitutes acceptance for purposes of double jeopardy. More consideration perhaps should be given to whether jeopardy does not attach to a guilty plea until judgment on that plea is entered.

Federal Rule of Criminal Procedure 11(f) states:

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

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for purposes of double jeopardy and does jeopardy attach

(Cont'd)
This implies that acceptance of the guilty plea does not always foreclose a judge from taking further action and even subsequently rejecting the plea if there is a question about the factual basis for the plea even if he or she has already "accepted" it. While the provision does not address the issue of double jeopardy, it follows from it that jeopardy does not attach irrevocably at the time of acceptance or that acceptance is not valid until there has been a factual determination.

The issues raised here are complex and my purpose is to provoke thought on an issue which heretofore has not been fully analyzed and which presents practical problems for trial judges who routinely "accept" pleas and who may not fully consider the potential double jeopardy consequences of their actions and the requirements of Fed.R.Crim.P. 11.

For instance, in *United States v. Cruz,* 709 F.2d 111 (1st Cir. 1983), the court held that a district court cannot unqualifiedly accept a bargained guilty plea and subsequently reject it on the basis of information contained in the presentence report. Jeopardy attaches to the acceptance. In *United States v. Sanchez,* 609 F.2d 761 (5th Cir. 1980), however, the court held that jeopardy did not attach to a guilty plea which the trial judge "temporarily" accepted while she studied the probation report. The court noted that no final judgment had been entered on the lesser included offense, the defendant had not been subjected to the harassment of successive prosecutions; and there was no question of multiple trial or multiple punishments. The same could be said in most cases where the defendant has entered a plea of guilty and judgment has not yet been entered. Not until judgment is entered does the defendant face the imminent prospect of punishment. Furthermore, a Rule 11 colloquy is far less an ordeal than a trial.

In *United States v. Combs,* 634 F.2d 1295 (10th Cir. 1980), *cert. denied,* 451 U.S. 913 (1981), the court held that jeopardy did not attach until judgment had been entered. "Until entry of judgment and sentencing on the accepted guilty plea, defendant had not been formally convicted." *Id.* at 1298. In a strongly worded dissent, Judge McKay stated that jeopardy must attach at the time of

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automatically or irrevocably when a plea is accepted.

In *U.S. ex rel. Metz v. Maroney,* 404 F.2d 233 (3d Cir. 1968), the court held that the state trial court properly acted in setting aside the guilty plea without the consent of the defendant at the time of sentencing because the defendant made statements then which, if true, constituted a complete defense to the charge of murder. Analogizing the situation to that in which a trial judge believes that an involuntary mistrial should be declared because of manifest necessity, the court held that, under the circumstances, requiring the defendant to stand trial on a plea of not guilty did not violate the constitutional prohibition against double jeopardy. The court concluded that fundamental fairness and the interests of justice warranted the state judge's actions. *Id.* at 236-37. In *U.S. v. Hecht,* 638 F.2d 651 (3d Cir. 1981), the court held that the trial court erred in vacating the plea because there was a sufficient factual basis for the guilty plea. The court, therefore, ordered the plea reinstated.

The *Metz* and *Hecht* cases suggest that a trial judge's discretion in accepting or rejecting a plea agreement is limited, and that his actions may have double jeopardy ramifications. They further suggest that acceptance of a guilty plea is not irrevocable.

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acceptance because the accepted plea, like a jury's verdict, establishes guilt and leaves the court nothing to do but impose sentence and enter judgment. *Id.* at 1300-01.

While I am aware that I am bound by the precedent of *Jerry* and the rule that jeopardy attaches at the time of acceptance, I am convinced that *Jerry* raised as many questions as it answered. For purposes of this case, I have concluded that even if jeopardy attaches at the time of acceptance of a plea, it does not attach irrevocably and may be released f there is manifest necessity.

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Under certain circumstances, a trial judge will be justified in vacating a plea if he becomes aware that there is an insufficient factual basis for the plea.

In *United States v. Cruz,* 709 F.2d 111, 114 (1st Cir. 1983), the court held that jeopardy does not attach automatically and irrevocably in all instance when a guilty plea is accepted. Like the *Metz* court, the *Cruz* court analogized the judicial withdrawal of a previously accepted guilty plea to the judicial declaration of a mistrial and suggested that the reasonable approach to these situations would be to hold that jeopardy attaches upon acceptance of the guilty plea, but that the district court may rescind its acceptance at any time before sentencing and judgment upon the showing of "manifest necessity." The *Cruz* court went on to hold, however, that it was unnecessary to reach this standard because the district court had violated Federal Rules of Criminal Procedure 11(e) and 32(c) by vacating the plea solely on the basis of information in the presentence report.

The Pennsylvania courts in their various rulings have implicitly held that Judge Schaeffer did not violate state procedural rules in ordering the withdrawal of Gilmore's guilty plea. Therefore, the question becomes that which the *Cruz* court did not reach, *i.e.* whether jeopardy attached irrevocably on January 10, 1983 when Judge Schaeffer stated that he would accept Gilmore's plea or whether he acted properly in rescinding the plea prior to sentencing because there was manifest necessity for such action.

Because I believe that Judge Schaeffer's actions were justified, Gilmore's petition for writ of *habeas corpus* must be denied. First, it would appear that Judge Schaeffer's comments at the January 10, 1983 plea hearing did not constitute an unequivocal acceptance

of the plea. The plea bargain between Gilmore and the Commonwealth was only in the discussion stage as of January 10, 1983, and it was not until the February 28th hearing that the Commonwealth outlined the bargain for the court. More importantly, however, even if Judge Schaeffer did accept the plea on January 10, 1983, the lack of factual basis for the plea warranted his order withdrawing the plea before sentencing on February 28, 1983.

Addressing the issue of what constitutes a voluntary and intelligently made plea, the Supreme Court in *North Carolina v. Alford,* 400 U.S. 25 (1970), held that a defendant's guilty plea was not rendered constitutionally invalid because the defendant protested his innocence as long as there was a strong factual basis for the plea presented by the state. "When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered . . . its validity cannot be seriously questioned." *Id.* at 38. In cases since *Alford,* courts have held that a judge may commit constitutional error if he adopts a guilty plea when defendant's admission of guilt is equivocal, and a sufficient factual basis is lacking. *See U.S. v. Hecht,* 638 F.2d 651, 653 (3d Cir. 1981); *Willett v. State of Georgia,* 608 F.2d 538, 540 (5th Cir. 1979); *United States ex rel. Dunn v. Cascles,* 494 F.2d 397, 399-400 (2d Cir. 1974).

Throughout the plea colloquy on January 10, 1983, Gilmore's attorney, Emmanuel Dimitriou, repeatedly emphasized that Gilmore was not admitting his guilt and that, in fact, he had no recollection of any of the acts related to the alleged incident as a result of his consumption of alcohol and his physical exhaustion at the time. Petitioner's Exhibit A, at 7-8, 10. Therefore, the only

factual basis for the plea were the facts Mr. Haddad, for the Commonwealth, stated would have been presented at trial. These were limited to facts about the cause of death, *i.e.*, blood alcohol level and blood meperidine level of decedent and two conflicting statements petitioner had allegedly made as to his involvement in the events which led to his wife's death. One was a statement to Trooper Pease that he had injected his wife with a vitamin and meperidine combination; the second was a statement to Chief Harley Smith in which Gilmore denied having made any injections. Petitioner's Exhibit A, at 5-7.

On February 28, 1983, after rejecting the plea bargain and thea recommendation of probation and a $10,000 fine, Judge Schaeffer attempted to engage in a colloquy with petitioner about the alleged admissions to Trooper Pease which were the basis of the Commonwealth's case against him. At this point, counsel for petitioner objected to any questioning by the judge stating that he had advised his client that his open plea was based on the record as it had already been established and that additional colloquy was unnecessary. *Id.* at 7. Judge Schaeffer then promptly ordered the plea withdrawn.

While it may have been preferable for Judge Schaeffer to elaborate on the reasons for his actions on the record at the time, I do not think his failure to do so affects the validity of his actions, and I accept and agree with his conclusion that there was an inadequate factual basis to support petitioner's guilty plea. The primary evidence pointing to petitioner's guilt were the admissions he allegedly made to Trooper Pease to the effect that he had injected his wife with meperidine. Yet, at the plea hearings, petitioner was adamant that he was not admitting his guilt. He also refused, through his counsel, in response to Judge Schaeffer's questions, to acknowledge making any statements to Trooper

Pease. Without verification of these statements at a minimum which could come only from the lips of petitioner, there was an insufficient basis for the plea. Statements which petitioner never admitted having made and the circumstances of which are unclear, are simply insufficient to support the guilty plea under *North Carolina v. Alford,* 400 U.S. 27 (1970), and its progeny. It is unclear from the record presented to me when petitioner allegedly made his conflicting statements; it is also unclear what petitioner's mental and physical condition was at the time he allegedly made the statements. Finally, petitioner's statement in which he allegedly admitted to injecting his wife with meperidine does not include a statement as to what time frame his admission covered, *i.e.* immediately prior to her death or several days before.

Therefore, jeopardy had not attached irrevocably to the plea to involuntary manslaughter entered by petitioner. And Judge Schaeffer, in ordering petitioner's guilty plea to be withdrawn and petitioner to stand trial, did not expose petitioner to a violation of the constitutional prohibition against double jeopardy for the involuntary manslaughter charge. Furthermore, under *Klobuchir v. Commonwealth of Pennsylvania,* 639 F.2d 966 (3d Cir.), *cert. denied,* 454 U.S. 1031 (1981), jeopardy has not attached to the higher offense with which petitioner was charged.

An appropriate order follows:

s/ Daniel H. Huyett, 3rd

Daniel H. Huyett, 3rd, Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 85-2940

IRVIN W. GILMORE

v.

LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania

ORDER

NOW, October 10, 1985, upon consideration of petitioner Gilmore's petition for writ of *habeas corpus,* petitioner's objections to the Report and Recommendation of United States Magistrate Tullio Gene Leomporra, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that the petition for writ of *habeas corpus* is DENIED and DISMISSED WITHOUT AN EVIDENTIARY HEARING.

There is no probable cause for appeal.

s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

APPENDIX D—ORDER, REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED AUGUST 27, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 85-2940

IRVIN W. GILMORE,

Petitioner

VS.

LEROY ZIMMERMAN, Attorney General for the Commonwealth of Pennsylvania,

Respondent

ORDER

HUYETT, J.

AND NOW, to wit, this day of ,1985, after consideration of the pleadings herein, and after review of the Report and Recommendation of Tullio Gene Leomporra, Administrative United States Magistrate, it is ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

Appendix D

2. The Petition for Writ of Habeas Corpus is DENIED and DISMISSED WITHOUT AN EVIDENTIARY HEARING.

There is no probable cause for appeal.

It is so ORDERED.

BY THE COURT:

_____

DANIEL H. HUYETT, 3RD, J.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 85-2940

FILED AUGUST 27, 1985

IRVIN W. GILMORE,

Petitioner,

VS.

LEROY ZIMMERMAN, Attorney General for the Commonwealth of Pennsylvania,

Respondent

REPORT AND RECOMMENDATION

TULLIO GENE LEOMPORRA
ADMINISTRATIVE U.S. MAGISTRATE

FACTS AND PROCEDURAL HISTORY:

This is a *pro se* Petition for Writ of Habeas Corpus filed by petitioner pursuant to 28 U.S.C. § 2241. Petitioner is seeking to enjoin a state criminal proceeding pending against him.

On June 19, 1981, a criminal complaint was issued and petitioner was arrested on charges of criminal homicide, aggravated

assault, and recklessly endangering another person. An information was lodged on October 21, 1981, in the Court of Common Pleas of Berks County charging petitioner with these offenses. Petitioner waived arraignment and entered a plea of not guilty on October 23, 1981. On September 3, 1982, the Honorable Forrest G. Schaeffer held a hearing on petitioner's motions for habeas corpus and suppression of evidence. These motions were denied by Judge Schaeffer on January 7, 1983, and the case was called for trial.

Subsequently, on January 10, 1983, petitioner tendered a plea of guilty to involuntary manslaughter. Judge Schaeffer accepted the plea[1] and deferred sentencing pending presentence investigation. On February 28, 1983, after reviewing the record and conducting a colloquy regarding the guilty plea and sentence, Judge Schaeffer determined that the guilty plea was inappropriate, directed it to be withdrawn, substituted a not guilty plea in its stead, and scheduled the case for trial.

On March 8, 1983, petitioner filed a motion for recusal which was denied by the court, and on March 9, 1983, petitioner filed a motion for change of venue which was granted changing the venue from Berks County to Schuylkill County Court of Common Pleas.

Petitioner renewed his motion for recusal and moved for dismissal on the basis of double jeopardy on May 26, 1983. This motion was denied on June 3, 1983, and on the same day, petitioner filed a notice of appeal with the Superior Court of Pennsylvania (#1460 Phila. 1983). In this appeal, petitioner contended that a trial in the Common Pleas Court of Schuylkill

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1. Notes of Testimony, Hearing of January 10, 1983, page 22.

County, then pending, would constitute a violation of 18 Pa.C.S.A. § 109, as well as double jeopardy rights afforded by the Constitution.

On June 22, 1984, the Superior Court entered an order affirming the Court of Common Pleas of Schuylkill County and denying petitioner's motion for dismissal of the criminal charges. Petitioner filed a timely application for reargument before the Superior Court which was denied on August 28, 1974. Petitioner then filed a timely petition for allowance of appeal in the Supreme Court of Pennsylvania (#641 E.D. Allocatur Docket, 1984). On March 25, 1985, the Supreme Court entered an order denying petitioner's request for allowance of appeal.

Petitioner filed the instant writ of habeas corpus with the United States District Court for the Eastern District of Pennsylvania and reiterates his claim that the commencement of a state criminal trial will violate his double jeopardy rights under the Constitution unless a stay of this trial is ordered.

JURISDICTION:

Petitioner has filed this habeas corpus action under 18 U.S.C. § 2241.[2] For a state prisoner, federal habeas corpus is substantially

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2. 28 U.S.C. § 2241 provides:

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of

(Cont'd)

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a post-conviction remedy, *Peyton v. Rowe*, 391 U.S. 54, 60 (1967),

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(Cont'd)

> the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.

(Cont'd)

see § 2254; nevertheless, jurisdiction to issue the writ exists in federal courts before a judgment is rendered in a state proceeding. *Moore v. DeYoung,* 515 F.2d 437 (3d Cir. 1975).

In the instant habeas corpus action, petitioner seeks an injunction against his forthcoming state criminal trial on the ground that the trial would place him in double jeopardy for the same offense. "Ordinarily the attempt of a state prisoner to obtain federal habeas corpus relief in advance of his state criminal trial would be completely hopeless. It would violate the statutory requirement of exhaustion of state remedies (*see* 28 U.S.C. § 2254(b)) in its most elementary sense because it would deprive the state courts of all opportunity to consider the defendant's federal claims in the ordinary course of trial and direct appeal." *U.S. ex rel. Stevens v. Circuit Court of Milwaukee County,* 675 F.2d 946 (7th Cir. 1982).

However, the relief petitioner is seeking is not release from custody, but to enjoin his state criminal trial. This relief, though within the broad remedial powers of the habeas corpus statute,

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(Cont'd)

> (d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

see 28 U.S.C. § 2251[3] (stay of state court proceedings), is remote from the purpose of habeas corpus which is release from unlawful incarceration. *U S. ex rel. Stevens v. Circuit Court of Milwaukee County, supra* at 947. In addition, it violates the principle of 28 U.S.C. § 2283[4], as construed in *Younger v. Harris,* 401 U.S. 37 (1971), that federal courts do not lightly enjoin state criminal proceedings.

Younger unequivocally reaffirmed the fundamental policy against federal interference with state criminal prosecutions.

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3. 28 U.S.C. § 2251 provides:

> Stay of State court proceedings
>
> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.
>
> After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

4. 28 U.S.C. § 2283 provides:

> Stay of State court proceedings
>
> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This policy of restraint, the court explained, is founded on the "basic doctrine of equity jurisprudence that courts of equity should not act and particularly should not act to restrain a criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44.

Accordingly, the *Younger* court held that in the absence of "extraordinary circumstances" creating a threat of irreparable injury both great and immediate, a federal court must not interfere by way of either injunction or declaratory judgment in a pending state criminal proceeding. *Id.* at 45; *see also, Ex parte Young,* 209 U.S. 123 (1908).

The policy of equitable restraint expressed in *Younger* is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights. Only if "extraordinary circumstances" render the state court incapable of fairly and fully adjudicating the federal issues before it can there be any relaxation of the deference to be accorded to the state criminal process.

However, several federal courts of appeal, including the Third Circuit, have found these considerations overborne when a petitioner is asserting a double jeopardy claim. *See e.g., Klobuchir v. Commonwealth of Pennsylvania,* 639 F.2d 966 (3d Cir.), *cert. denied, 454 U.S. 1031 (1981); Fain v. Duff,* 488 F.2d 218 (5th Cir. 1973), *cert. denied,* 421 U.S. 999 (1975); *U.S. ex rel. Russo v. Superior Court of New Jersey,* 483 F.2d 7 (3d Cir.), *cert. denied,* 414 U.S. 1023 (1973); *U.S. ex rel. Stevens v. Circuit Court of Milwaukee County, supra; Delk v. Atkinson,* 665 F.2d 90 (6th Cir. 1981); *Gully v. Kunzman,* 592 F.2d 283 (6th Cir. 1979); *U.S. ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968).

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The court in *Gully v. Kunzman, supra* at 286-287, stated that "double jeopardy claims, by their very nature, involve exceptional circumstances warranting exercise of the habeas corpus power by a federal court prior to a final judgment of conviction in a state court proceeding despite the attendant risk of interfering with the pending proceedings."

In *U.S. ex rel. Webb v. Court of Common Pleas, supra* at 1038-1039, the court explained, "we are mindful of the Supreme Court's admonition that, even where the petitioner has properly requested and has been denied all available state pretrial remedies, federal habeas corpus does not lie, absent 'special circumstances' to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." However, with regards to a double jeopardy claim, "special circumstances," exist because forcing the defendant to trial would defeat the constitutional right he seeks to preserve.[5]

The Third Circuit in *Klobuchir v. Commonwealth of Pennsylvania, supra,* was faced with similar circumstances as in the present case. There, the petitioner filed a petition for habeas corpus seeking to prevent the retrial on his original first degree murder indictment after the state court had vacated his plea-bargained conviction for third degree murder. The court, without even considering a question of jurisdiction, addressed the merits

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5. A footnote in the *Webb* decision cites *U.S. ex rel. Russo v. Superior Court of New Jersey, supra,* and states that this court has already ruled that a district court has jurisdiction to grant habeas relief to a petitioner who is free on bail pending retrial in a state court, even though defendant has not yet been convicted. Id. at 1039, n.17. *Russo* held that a federal district court had jurisdiction to entertain a habeas corpus petition by a state prisoner who asserted that it would violate constitutional prohibition against double jeopardy to again try the defendant.

of the case and found that the double jeopardy clause did not prevent the state courts from retrying the defendant.

In addition to requiring "special circumstances," "federal courts should not entertain double jeopardy claims on pretrial habeas corpus unless the defendant has exhausted whatever procedures are available to him under state law[6] for pre-exposure vindication of his rights." *Gully v. Kunzman, supra* at 287; *see also, Delk v. Atkinson, supra.* Relevant state remedies are exhausted when the petitioner has nowhere to turn to in the state judicial system to get the charges against him dismissed before trial. *U.S. ex rel. Stevens v. Circuit Court of Milwaukee County, supra.*

Petitioner, in this case, has exhausted all his available pretrial remedies. After his guilty plea was withdrawn by Judge Schaeffer, petitioner move the trial court for dismissal on the basis of double jeopardy on May 26, 1983. Judge Schaeffer denied this motion and petitioner appealed to the Superior Court of Pennsylvania. The Superior Court affirmed Judge Schaeffer's decision on June 22, 1984, and denied a motion for reargument on August 28, 1984. Petitioner then filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. This was denied on March 25, 1985.

Petitioner, therefore, has no other road open to him in the state judicial system to obtain the relief he seeks. Since double

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6. In *Moore v. DeYoung, supra,* at 442, the court held that the statute empowering a district court to issue a writ of habeas corpus before judgment is rendered in a state criminal proceeding does not refer to exhaustion. Under the prinicple of federalism, exhaustion is required before a pretrial writ may be issued.

jeopardy claims are "special circumstances" allowing a federal court to entertain a pretrial habeas corpus petition, and petitioner has exhausted his state remedies, we will address the merits of petitioner's claim.[7]

DOUBLE JEOPARDY:

Petitioner asserts that since his guilty plea to involuntary manslaughter was accepted by the court, he was already put in jeopardy once and the withdrawal of the guilty plea and a trial on the charge of murder would place him in jeopardy for the same offense twice in violation of the double jeopardy clause of the Constitution.[8]

The facts surrounding the court's withdrawal of the guilty plea are as follows:

On January 10, 1983, after a colloquy, Judge Schaeffer accepted petitioner's plea of guilty to involuntary manslaughter and ordered a presentence report and a psychiatric evaluation of petitioner (N.T. January 10, 1983, page 22). On February 28, 1983, Judge Schaeffer conducted a further colloquy regarding

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7. In addition, the Commonwealth of Pennsylvania does not contest jurisdiction. In fact, in its answer to the petition, the Commonwealth stated, "a review of the cases cited by the Petitioner in his Memorandum of Law clearly supports the position that this court has jurisdiction of the petitioner's claim and that it may be filed before the Petitioner is required to trial in the charge for which he is claiming double jeopardy."

8. The double jeopardy clause of the Fifth Amendment provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ." The double jeopardy clause is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1964).

the plea and sentencing. He started off the proceeding by stating that there was a "plea of guilty to involuntary manslaughter entered, but there was no plea bargain yet agreed upon because it was conditional upon the obtaining of certain psychiatric testimony" (N.T. February 28, 1983, page 2).

After hearing from Charles Haddad, Special Assistant Attorney General, concerning the nature of the plea bargain between his office and the petitioner, Judge Schaeffer stated that he read the presentence report, the psychiatric report, and carefully reviewed the evidence presented, and that after considering this, he would not accept the plea bargain (N.T. February 28, 1983, pages 5-6). He then instructed the petitioner and counsel, Emmanuel H. Dimitriou, Esquire, that the petitioner had a choice of permitting the plea to be an open plea and he would sentence him as he felt proper, or petitioner could withdraw the guilty plea (N.T. February 28, 1983, page 6).

After consulting with counsel, petitioner expressed his desire to stand on his guilty plea and would prefer to go ahead with sentencing (N.T. February 28, 1983, page 6). Judge Schaeffer then questioned petitioner under oath. He asked Dr. Gilmore if he recalled making a statement to a Trooper Pease that he gave his wife vitamin B-12 and Meperidine. At this point, petitioner's attorney interjected that he didn't believe that those matters were relevant at that time. Mr. Dimitriou stated: "we have entered a plea on the record, and I do not believe that it's appropriate to develop into anything else other than what is pertinent at this time, which is the sentence." Judge Schaeffer then indicated that in accordance with Rule 320 of the Pennsylvania Rules of Criminal Procedure,[9] the guilty plea is struck off and the defendant will

9. Rule 320. Withdrawal of Plea of Guilty

(Cont'd)

stand trial (N.T. February 28, 1983, page 7).

Petitioner argues that where jeopardy has attached either by plea or commencement of a trial, a defendant can be subsequently put in jeopardy only where: 1) the initial jeopardy was terminated by his consent; or 2) the initial jeopardy was terminated without his consent but under circumstances where it was manifestly necessary to protect his interests.[10] In essence, petitioner contends that the trial court's power to withdraw a guilty plea pursuant to Rule 320 is limited to these situations.[11]

(Cont'd)

> "At any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted."

10. In support of this position, petitioner cites *U.S. ex rel. Metz v. Maroney*, 404 F.2d 233 (3d Cir. 1968).

11. Petitioner states that *United States v. Hecht*, 638 F.2d 651 (3d Cir. 1981), is analogous to the present situation. In *Hecht*, the defendant entered a guilty plea to one count of a four count indictment and made statements inconsistent with his plea of guilty. At the time of sentencing, the court vacated the guilty plea and ordered him to stand trial. The Third Circuit ruled that the trial court abused its discretion in vacating the guilty plea since there was a sufficient factual basis for the plea.

However, the *Hecht* court recognized that a guilty plea could be withdrawn, pursuant to Rule 11(f) of the Federal Rules of Criminal Procedure, without the defendant's consent where the factual basis for the plea is seriously undermined. *Id.* at 653. The *Hecht* court also pointed out that the defendant admitted his guilt several times and there was a factual basis for the plea.

The instant case differs from *Hecht* in that Dr. Gilmore never admitted guilt, and Judge Schaeffer believed there to be an insufficient factual basis for the plea. In a Memorandum Opinion dated August 3, 1983, Judge Schaeffer explained his reasons for withdrawing the guilty plea:

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However, federal habeas corpus review is limited to alleged violations of the Constitution or federal law. 28 U.S.C. § 2254(a); *Rose v. Hodges,* 423 U.S. 19, 21-22 (1975); *U.S. ex rel. Lurry v. Johnson,* 378 F.Supp. 818, 821 (E.D. Pa. 1974). Federal courts cannot review alleged errors of state law in habeas corpus petitions. *U.S. ex rel. Oliver v. Rundle,* 298 F.Supp. 392, *aff'd,* 417 F.2d 305, *cert. denied,* 397 U.S. 1050, *rehrg. denied,* 399 U.S. 938 (1969).

The question whether Rule 320 allows a court to withdraw a guilty plea only when the defendant consents or to protect his rights is not a constitutional claim, but a question of interpretation of a state procedural rule. Our review is limited to the constitutional issue of whether the withdrawal of the guilty plea for involuntary manslaughter and a subsequent trial for murder would violate the double jeopardy clause. The issue which must be addressed is—when does jeopardy attach in this case?

(Cont'd)

> "In accepting a guilty plea, the court has a duty to the public and to the defendant. On the one hand, it should not permit the defendant, if guilty of a more serious crime, to avoid the full consequences of his act by pleading guilty to a lesser crime. On the other hand, it should not allow him, if innocent, to plead guilty. If a defendant refuses to admit his guilt and there is an uncertain factual basis for the plea, in fairness and justice to the defendant, no guilty plea should be accepted.
>
> We find both the public and the defendant are best served by striking, and refusing final acceptance of, the guilty plea."

Id. at 6.

In addition, the *Hecht* court found that reinstatement of the guilty plea did not violate double jeopardy.

Appendix D

Petitioner asserts that 18 Pa.C.S.A. § 109[12] specifically

12. § 109. When prosecution barred by former prosecution for the same offense

When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.

(2) The former prosecution was terminated, after the indictment had been found, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant.

(4) The former prosecution was improperly terminated after the first witness was sworn but before a verdict, or after a plea of guilty was accepted by the court.

delineates the point at which jeopardy attaches which, it is argued, occurred when the guilty plea to involuntary manslaughter was accepted by the court.

In *Serfass v. United States,* 420 U.S. 377, 388 (1974), the Court addressed the issue of when jeopardy attaches. The Court stated that the concept of attachment of jeopardy defines a point in criminal proceedings at which the purposes and policies of the double jeopardy clause are implicated. Jeopardy does not attach until a defendant is put to trial, which in a jury trial occurs when the jury is empaneled and sworn. *Id.* at 388; *Illinois v. Somerville,* 410 U.S. 458 (1973); *Downum v. United States,* 372 U.S. 734 (1963). In a nonjury trial, jeopardy attaches when the court begins to hear the evidence. *Klobuchir v. Commonwealth of Pennsylvania, supra; United States v. Jorn,* 400 U.S. 470, 479 (1971); *U.S. ex rel. Webb v. Court of Common Pleas, supra* at 1039.

The *Serfass* court explained that the "court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of fact whether it be a jury or a judge." *Id.* at 388; *United States v. Jorn, supra; see Collins v. Loisel,* 262 U.S. 426, 429 (1923); *Bassing v. Cady,* 208 U.S. 386, 391-392 (1908); *United States v. MacDonald,* 207 U.S. 120, 127 (1907); *Kepner v. United States,* 195 U.S. 100, 128, 130-131 (1904).

Since neither of these stages in the present criminal proceeding has been reached, jeopardy has not yet attached. The Supreme Court early observed that the object of the double jeopardy clause is to protect a defendant who has been once convicted and punished for a particular crime from the possibility of further

punishment by being again tried or sentenced for the same offense. *In re Nielson,* 131 U.S. 176 (1889); *Ex parte Lange,* 85 U.S. 163 (1874); *see also, United States v. Wilson,* 420 U.S. 332, 343 (1975). Petitioner, here, faces no threat of either multiple punishment or successive prosecutions and, therefore, the double jeopardy clause is not offended.

In addition, even assuming petitioner's argument that jeopardy attaches at the time a guilty plea is accepted, petitioner entered his guilty plea to involuntary manslaughter and as a consequence jeopardy has yet to attach as to the charge of homicide which petitioner stands ready to be tried for.

In *Klobuchir v. Commonwealth of Pennsylvania, supra,* as mentioned earlier, the Third Circuit encountered a similar situation as in the current case. In *Klobuchir,* the defendant filed a petition for writ of habeas corpus seeking to prevent the retrial of the defendant on his original first degree murder indictment after the state court had vacated his guilty plea to third degree murder. The court held that the double jeopardy clause did not bar the state from retrying the defendant on his original first degree murder indictment because when the trial judge accepted the defendant's guilty plea to third degree murder, the court could not have considered any greater charge, and therefore the defendant was never in jeopardy of being convicted of first degree murder. *Id.* at 970.

Klobuchir further stated that "unlike a judge accepting a guilty plea, the jury, when it convicts on a lesser included offense, has had a full opportunity to convict on the greater charge. The jury's return of a guilty verdict on the lesser charge can be interpreted as an implicit acquittal only because it has rejected the opportunity to convict on the greater charge. But the trial

judge by accepting Klobuchir's guilty plea to third degree murder, quite obviously could not have considered any greater charge. He thus could not have convicted Klobuchir of first degree murder . . ." *Id.* at 969.

Petitioner, Dr. Irvin Gilmore, has not yet faced a judge or jury on the charge of murder, and to stand trial for the first time on that charge will not result in double jeopardy since he was never in jeopardy of being convicted of murder when he entered a guilty plea to involuntary manslaughter.[13]

We, therefore, find that the commencement of the state criminal trial for murder against the petitioner will not violate double jeopardy, and such a proceeding should not be enjoined by a federal court.

Accordingly, the petition for writ of habeas corpus should be denied.

RECOMMENDATION:

It is recommended that the Petition for Writ of Habeas

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13. This result is in agreement with other circuits that addressed this issue. *See United States v. Williams,* 534 F.2d 119, 121 (8th Cir.), *cert. denied,* 429 U.S. 894 (1976); *Ward v. Page,* 424 F.2d 491 (10th Cir.), *cert. denied,* 400 U.S. 917 (1970); *United States v. Barker,* 681 F.2d 589 (9th Cir. 1982).

In *Barker,* the court held that reinstatement of the original indictment charging defendant with first degree murder and conspiracy to commit murder, after defendant's plea of guilty to second degree murder had been set aside, did not violate defendant's rights under the double jeopardy clause, since the defendant had not stood trial on the first degree murder charge and there had not yet been consideration of factual bases of first degree murder and conspiracy. *Id.* at 591.

Appendix D

Corpus be DENIED and DISMISSED WITHOUT AN EVIDENTIARY HEARING. there is no probable cause for appeal.

s/ Tullio Gene Leomporra
TULLIO GENE LEOMPORRA
ADMINISTRATIVE U.S.
MAGISTRATE

ENTERED 8/27/85
CLERK OF COURT

APPENDIX E—PETITION FOR ALLOWANCE OF APPEAL DENIED MARCH 25, 1985

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

March 27, 1985

Emmanuel H. Dimitriou, Esq.
522-24 Court Street
P.O. Box 677
Reading, PA 19603

In Re: Commonwealth vs. Irvin W. Gilmore
No. 641 E.D. Allocatur Docket, 1984

Dear Mr. Dimitriou:

This is to advise you that your Petition for Allowance of Appeal, filed in the above-captioned matter, was denied by the Court on March 25, 1985.

Very truly yours,

s/ Patrick Tassos
Patrick Tassos
Deputy Prothonotary

PT:Ml
cc: Charles A. Haddad, Esq.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CASE NO. CA85-2940

IRVIN W. GILMORE,

Petitioner

vs.

LEROY ZIMMERMAN, Attorney General for the Commonwealth of Pennsylvania,

Defendant

AMENDED PETITION FOR HABEAS CORPUS

EMMANUEL H. DIMITRIOU,
ESQUIRE
Attorney for Petitioner
522-24 Court Street
P.O. Box 677
Reading, Pennsylvania 19603
(215) 376-7466

1. Petitioner is an adult individual currently residing at 4100 Kutztown Road, Temple, Berks County, Pennsylvania.

2. On or about October 21, 1981, a criminal information, to wit, #81159301 & "A", was lodged in the Court of Common Pleas of Berks County, Pennsylvania by the Attorney General

of the Commonwealth of Pennsylvania charging the Petitioner with Criminal Homicide, 18 Pa. C.S.A., Section 2701; Aggravated Assault, 18 Pa. C.S.A., Section 2702; and Recklessly Endangering Another Person, 18 Pa. C.S.A., Section 2705.

3. On March 9, 1983, by Court Order, venue in the above captioned matter was changed to the Court of Common Pleas of Schuylkill County, Pennsylvania to #280 and #280A of 1983.

4. On January 10, 1983, pursuant to a plea bargain, a plea of guilty was tendered and accepted by the court to the charge of involuntary manslaughter and sentencing was deferred pending a pre-sentence investigation, as more specifically set forth in the notes of testimony which are incorporated herein by reference and set forth in Exhibit "A".

5. At the sentencing hearing scheduled thereafter, the Court refused to sentence in accordance with the plea bargain and advised the Petitioner that he had the right to withdraw his plea bargain and proceed to trial or, if he so chose he could be sentenced as if he had entered an open plea to a sentence within the statutory range of permissible sentences, as more specifically set forth in Exhibit "B", which is attached hereto and incorporated herein by reference.

6. After consultation with counsel, the Petitioner chose to stand on his plea as entered and agreed that sentence be entered accordingly, as more specifically set forth in Exhibit "B", which is attached hereto and incorporated herein by reference.

7. Thereupon the Court over the objection and without the consent of the Petitioner, entered an Order "striking the petitioner's guilty plea and listing the matter for trial", as more

specifically set forth in Exhibit "B", which is attached hereto and incorporated herein by reference.

8. The Petitioner filed a request in the trial Court moving that the prosecution be dismissed for violation of the double jeopardy provisions of the Pennsylvania Constitution and statutes as well as the double jeopardy provisions of the Constitution of the United States, as more specifically set forth in Exhibit "C", which is attached hereto and incorporated herein by reference.

9. The aforesaid Petition was dismissed by the trial Court who filed a memorandum opinion dated August 3, 1983, as set forth in Exhibit "D", which is attached hereto and incorporated herein by reference and a revised opinion dated September 23, 1983 as set forth in Exhibit "E", which is attached hereto and incorporated herein by reference, setting forth the trial Court's reason for denial of the Petitioner's motion.

10. A timely appeal was taken to the Superior Court of the Commonwealth of Pennsylvania, (#1460 Phila. 1983). A true and correct copy of the Petitioner's brief filed in support of his appeal is set forth in Exhibit "F", which is attached hereto and incorporated herein by reference.

11. On June 22, 1984, the Superior Court of the Commonwealth of Pennsylvania affirmed the lower court's opinion. The opinion of the Superior Court is set forth in Exhibit "G", which is attached hereto and incorporated herein by reference.

12. A timely petition for allowance of appeal was filed in the Supreme Court of Pennsylvania, (#641 E.D. Allocatur Docket, 1984). A true and correct copy of said petition is set forth in Exhibit

"H", which is attached hereto and incorporated herein by reference.

13. That on March 25, 1985, the Supreme Court of Pennsylvania entered an Order denying Petitioner's request for allowance of appeal.

14. Jurisdiction in this matter is vested in this Court by virtue of 28 U.S.C. Section 2241.

15. That under state law, the Petitioner has exhausted all remedies available to him, thereby entitling the Petitioner to relief under the aforementioned statute.

16. The trial ordered violates the Petitioner's right to be free from double jeopardy as guaranteed by the Constitution of the United States, the Petitioner having been duly convicted of the offense of involuntary manslaughter.

17. As set forth in length herein, the Petitioner avers that the commencing of a trial will itself violate the Petitioner's rights granted under the Constitution of the United States unless a stay of any trial or any further proceeding during the pendency of the within matter is ordered by the Court.

18. Petitioner avers that the abuse of discretion by the trial judge below constituted a denial of due process of law as guaranteed by the Constitution of the United States.

WHEREFORE, Petitioner prays your Honorable Court grant a writ of habeas corpus. Further, the Petitioner prays your Honorable Court enter an Order staying any further proceedings in the Court of Common Pleas in Schuylkill County in the matter

Appendix E

of Commonwealth of Pennsylvania vs. Irvin W. Gilmore during the pendence of the within proceeding.

RESPECTFULLY SUBMITTED:

s/ Emmanuel H. Dimitriou
EMMANUEL H. DIMITRIOU, ESQUIRE
Attorney for Petitioner

APPENDIX F—MEMORANDUM AND ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JUNE 22, 1984

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1460 Philadelphia, 1983

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

IRVIN W. GILMORE,

Appellant

Appeal From Order, Court of Common Pleas, Criminal Division, Schuylkill County, No. 280 and 280A of 1983

BEFORE: CAVANAUGH, BROSKY and POPOVICH, JJ.

MEMORANDUM:

This is an appeal from an order of the Schuylkill County Court which denied a motion to dismiss criminal charges. Appellant, Irvin W. Gilmore, sought dismissal of the charges on the basis that further criminal proceedings against him would be violative of his rights not to be twice put in jeopardy for the same offense, and of his rights under 18 Pa. C.S. § 109. Jurisdiction over this appeal is based upon *Commonwealth v. Bolden*, 472 Pa. 602, 373 A.2d 90 (1977). Appellant was charged with multiple offenses including murder, arising out of the death of his wife

on November 27, 1980. After the conduct of pretrial procedures, appellant tendered a plea of guilty to Involuntary Manslaughter on January 10, 1983. The Commonwealth's theory was that Dr. Gilmore had injected his wife with meperidine which, together with her then present high blood alcohol content resulted in her death. The Commonwealth at the time of the plea stated that it could produce evidence through an admission that Gilmore had given his wife an injection or injections of a vitamin and meperidine, although when questioned on another occasion Gilmore denied giving any injections. The Commonwealth at the plea colloquy further grounded its concurrence in the involuntary manslaughter plea agreement on the fact that Gilmore: "is not denying at this time that he gave the injections." Defense counsel made it clear that his client was not making any actual admissions as to the Commonwealth's contentions, but that his client was willing to put himself in the same position as if he were making such admission. Although a negotiated plea as to sentence had been reached between counsel, it was not placed on the record at that time and the matter was continued for presentence investigation, as well as a psychiatric examination. The court made it clear to Gilmore that be would not be bound by any plea agreement but if the agreement was not accepted, appellant would be free to withdraw his plea. After further discussion, including defense counsel's statement that he had advised Mr. Gilmore "that he can enter a plea of guilty without admitting guilt . . . .", the court joined in this aspect of the plea and advised Gilmore that under *Commonwealth v. Cottrell*[1] his plea would not be rendered invalid "merely because you are unable or unwilling to detail the occurrance in court or merely because you are unable to remember or have a recollection of what occurred." The matter was concluded by the court's stating "The guilty plea is accepted."

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1. 249 Pa. 294, 433 A.2d 177 (1969).

Appendix F

On February 28, 1983, the matter again came before the court. The Commonwealth again repeated its posture that it had no objection to the lesser plea to involuntary manslaughter so long as Gilmore recanted or retracted his denial that he had given his wife the meperidine injection and they would agree that an involuntary manslaughter plea was appropriate. The Commonwealth was willing, however, to equate the January 10, 1983 plea as an effective withdrawal of the denial relative to the injection. The negotiated plea agreement was presented to the court. It was for a fine, community service and probation not to exceed five years. The court, after stating that the presentence report, the psychiatric evaluation and the evidence had been reviewed, refused to accept the negotiated plea arrangement as to sentence. Gilmore was granted a recess in order to determine if he wanted to withdraw the plea and after consultation, returned to court to state through his counsel that he desired to stand on the plea to involuntary manslaughter and to submit to sentencing at the court's discretion. Thereupon, the court proceeded to state that there were important factors that it should understand and undertook to ask appellant about his statement that he had injected his wife. Counsel advised the court that he felt that it was inappropriate to "develop" into "anything else." The court thereupon "struck off" the guilty plea pursuant to Pa. R.Crim.P. 320 and set the matter for trial. The proceeding concluded as follows:

> MR. DIMITRIOU: If it please the Court, before the Court proceeds, I'd like to know why the Court is taking the position that he's taking, and I would like to confer with Dr. Gilmore. I've merely stated my position. That doesn't mean that he would not respond.

Appendix F

THE COURT: Mr. Dimitriou, there are too many unanswered quetions in this whole matter, and therefore, I think the appropriate procedure is that the matter go to trial, and that's why I struck the guilty plea.

MR. DIMITRIOU: Your Honor—

THE COURT: Court is adjourned.

The present appeal presents an unusual question under Pennsylvania law. There are, of course, numerous cases dealing with the issue of a defendant who seeks to withdraw a guilty plea. Presently, however, appellant seeks to enforce a plea and to prevent the Commonwealth from proceeding against him. Appellant's arguments have been given careful consideration by the trial court, including discussions of the applicable case law, and a reasoned accommodation between the formulations of Pa. R.Crim.P. 320 and 3109 of the Crimes Code. We have carefully reviewed the record and the briefs and conclude that the revised opinion of the Honorable Forrest G. Schaeffer capably meets appellant's argument and correctly concludes that neither double jeopardy considerations nor § 109 of the Crimes Code preclude trial of this matter.

Order affirmed.

Appendix F

ORDER

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1460 Philadelphia, 1983

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

IRVIN W. GILMORE,

Appellant

Appeal From Order, Court of Common Pleas, Criminal Division, Schuylkill County, No. 280 and 280A of 1983

BEFORE: CAVANAUGH, BROSKY and POPOVICH, JJ.

PER CURIAM:

Order affirmed.

APPENDIX G—REVISED OPINION OF FORREST G. SCHAEFFER, J. COURT OF COMMON PLEAS DATED SEPTEMBER 23, 1983

Defendant has appealed from our order refusing to dismiss these proceedings against him on double jeopardy grounds.

In June 1981, the defendant, Irvin W. Gilmore, a physician, was charged and arrested for the murder of his wife, Patricia, for aggravated assault upon her and for recklessly endangering her life. She had been found dead in the bed she shared with him Thanksgiving Day morning, November 27, 1980.

On October 23, 1981, he waived arraignment. On September 3, 1982, the court held a hearing on defendant's motions for habeas corpus and to suppress evidence, and on January 7, 1983, denied the motions and called the case for trial.[1]

The defendant tendered a plea of guilty to involuntary manslaughter and the court received it by saying on the record: "The guilty plea is accepted."[2] After carefully reviewing the record, on February 28, 1983, the court determined that the guilty plea was inappropriate, directed it be withdrawn, substituted a not guilty plea for its stead pursuant to Pa. R. Crim. P. 320, and scheduled the case for trial. Defendant, in March, 1983, sought and obtained a change of venue and then on May 26, 1983, moved to dismiss the proceedings on double jeopardy grounds. This court

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1. The delay between arraignment and the final disposition of the pretrial motions resulted from the Commonwealth and the defendant agreeing to wait for the transcription of the preliminary hearing testimony, to fix a pretrial hearing date suitable to both counsel, to wait for the transcription of the pretrial hearing testimony and to prepare briefs and argue the pretrial issues. The defendant requested the continuances and waived his Rule 1100 rights.

2. N.T., Hearing of January 10, 1983, p. 22.

denied the motion to dismiss and the defendant immediately filed an interlocutory appeal with the Superior Court pursuant to the rule laid down by our Supreme Court in *Commonwealth v. Bolden,* 472 Pa. 602, 373 A. 2d 90 (1977).

Defendant argues that since he tendered a guilty plea to involuntary manslaughter and since the court stated, "The guilty plea is accepted," the defendant, on the facts of this case, cannot be brought to trial and all charges against him must be dismissed.

The Commonwealth's evidence presented at the preliminary hearing, and made a part of the record at the habeas corpus hearing, was to the effect that the defendant and his wife had been to a party on Thanksgiving Eve with defendant's son and daughter-in-law, that they returned at approximately 12:30 a.m. on Thanksgiving morning, that defendant and his son retired, that defendant's daughter-in-law then retired at about 2:00 a.m., and that at or about 8:00 a.m. that same morning, defendant found his wife dead beside him.[3]

The Commonwealth's evidence relative to the autopsy revealed that defendant's wife had a blood alcohol content of 0.23 or 0.24;[4] that she suffered numerous bruises about the left hand, head, and face from a blunt object;[5] that she had been

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3. Statement of December 11, 1980, pp. 4, 5, 23.

4. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, pp. 35, 61; testimony of Isadore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, p. 4.

5. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, pp. 11 - 16, 22 - 24, 39.

injected four to six times in the buttocks at two separate site areas;[6] that in each of these two site areas meperidine had been injected;[7] that the injections were in her buttocks in an area where it was unlikely she would have injected herself;[8] that she died from a combination of alcohol and meperidine;[9] and that the amount of meperidine in her system was 2.90 micrograms per milliliter of blood, a toxic amount and sufficient to cause death.[10] The Commonwealth's evidence included a statement by the defendant to Trooper Pease that he had given his wife injections of vitamin B-12 and meperidine for her diarrhea and nausea.[11] The Commonwealth's evidence also included another statement from the defendant, "I have what killed her. It's Lomotil,"[12] and a contradictory later statement, "Patty (defendant's wife) died from

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6. Testimony of John Ingalls Keith, M.D., before District Justice Shultz, July 29, 30, 1981, pp. 5, 6; testimony of Isadore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, p. 42.

7. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, pp. 35, 69, 70.

8. Testimony of John Ingalls Keith, M.D., before District Justice Shultz, July 29, 30, 1981, pp. 5, 6; testimony of Isadore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, pp. 55, 56, 58.

9. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, p. 35; testimony of Isadore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, pp. 3, 4.

10. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, p. 35; testimony of Isadore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, pp. 35, 36.

11. N.T., Pretrial hearing of September 3, 1983, p. 63.

12. N.T., Pretrial hearing of September 3, 1983, p. 33.

an overdose of Demerol (i.e. meperidine)."[13] Defendant also said in his statement to the district attorney that his wife could not take Demerol (i.e. meperidine), that she got sick on it, that another doctor, one Dr. Menges, had told her it was a "no, no," and that he, defendant, had never known her to give herself a shot.[14]

The Commonwealth's experts did not rule out that defendant's wife could have fallen several times. She also could have been involved in a fight with defendant's daughter-in-law or son, and she could have injected herself with some or all of the meperidine. Defendant had said in his statement to the district attorney that his wife medicated herself with Lomotil, knew how to fill a syringe, and that she had brought his medicine bag from the car to the bedroom.[15] She may have self-injected the meperidine.

Although some of defendant's alleged statements were contradicted by his other statements or by what his attorney said at the guilty plea colloquy,[16] these statements are consistent with a befuddled and confused mind, or explained by information learned by defendant between the earlier and the later contradictory statement.

In his statements to Chief Smith, the district attorney and Trooper Pease, defendant never admitted that he had struck his wife, killed his wife or intended to kill her.

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13. Testimony of Barrie Pease, hearing before District Justice Shultz, July 29, 30, 1981, p. 37.

14. Statement of December 11, 1980, pp. 6, 15, 16.

15. Oral Statement of December 11, 1980, pp. 4, 16, 27 - 29.

16. N.T., Plea of Guilty, pp. 7, 8.

Appendix G

A trier of fact could find the Commonwealth's evidence in this case insufficient to prove that defendant inflicted the bruises upon his wife or injected here with meperidine.

The defendant's alleged statement to Trooper Pease is not necessarily inculpatory. Without knowing when and how many injections defendant admitted administering, a factfinder would be free to find that such injections by a physician were lawful.

The defendant could have injected his wife with some or all of the meperidine, but could have done so without an intent to kill her and without the recklessness or gross negligence required for involuntary manslaughter.

Accordingly, a trier of fact could conclude that even if defendant had injected his wife with meperidine, his act was not unlawful under the circumstances.

The Commonwealth itself asserted that if the case went to trial, it "most likely would not obtain any verdict higher than involuntary manslaughter."[17] Nevertheless, it took the rather peculiar position that so long as defendant denied injecting his wife with meperidine, it would make him stand trial for murder, but that if defendant would retract his denial and admit he was responsible for his wife's death, that admission would somehow satisfy it that the appropriate charge was involuntary manslaughter.[18]

On January 10, 1983, before the start of the *voir dire*, counsel

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17. N.T., Hearing of February 28, 1983, p. 4

18. N.T., Hearing of February 28, 1983, p. 3.

for the defendant and the Commonwealth informed the court that the defendant would tender a plea of involuntary manslaughter, if the other charges against the defendant were dismissed. Defense counsel informed the court in the presence of the defendant that the defendant "recognizes the possibility that he (defendant) may have injected meperidine in accordance with the statement which has been admitted (i.e., not suppressed) by the court," and that defendant is "stating that he has no recollection of injecting his wife with meperidine or any of the acts related to this incident as a result of his consumption of alcohol and the physical exhaustion at the time," and that defendant was entering the plea because he had concluded, after getting advice from his counsel, that it would be in his best interests to do so.[19]

However, defense counsel was adamant that even though defendant desired to plead guilty, he was not admitting that he had killed his wife.[20]

Defendant, himself, stated to the court that he understood the facts set out by respective counsel, that he neither wanted to contradict nor challenge the statements made by counsel, and that he "would just like to concur with my attorney..."[21]

Although no plea bargain was stated on the record, the court advised the defendant at the time the guilty plea was tendered,

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19. N.T., Plea of Guilty, pp. 7, 8.

20. N.T., Plea of Guilty, pp. 9, 10, 19, 20.

21. N.T., Plea of Guilty, pp. 8, 9.

that the court was not bound by the terms of any plea bargain that might exist.[22]

In accepting a guilty plea, the court has a duty to the public and to the defendant. On the one hand, it should not permit the defendant, if guilty of a more serious crime, to avoid the full consequences of his act by pleading guilty to a lesser crime. On the other hand, it should not allow him, if innocent, to plead guilty. If a defendant refuses to admit his guilt and there is uncertain factual basis for the plea, in fairness and justice to the defendant, no guilty plea should be accepted.

We find both the public and the defendant are best served by striking, and refusing final acceptance of, the guilty plea.

We find that there is an inadequate factual basis to support the defendant's equivocal guilty plea. While we also found that there was sufficient circumstantial evidence to permit a factfinder to find the defendant guilty of murder,[23] an adequate factual basis to support an equivocal guilty plea is not the same as the evidence required to sustain a verdict after trial. Nor is a finding of an insufficient factual basis to accept a guilty plea the equivalent of a not guilty verdict. The defendant may properly be convicted at trial even though a sufficient factual basis was not established for a guilty plea. This is so because conflicts among sources of information used to establish the factual basis for a guilty plea could preclude the judge from accepting the guilty plea, but, a factfinder might accept evidence tending to prove guilt and

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22. N.T., Plea of Guilty, pp. 11, 12.

23. See the court's Findings of Fact and Conclusion of Law made in denying defendant's petition for habeas corpus. Adjudication of omnibus pretrial motions, January 10, 1983, pp. 1 - 10.

properly draw inferences against the defendant therefrom and reject evidence and inferences favoring the defendant. Barkai. Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants? 126 U. Pa. L. Rev. 88, 98 (1977).

Federal and state case law supports the acceptance of an equivocal guilty plea only where there is strong evidence of guilt. *See N. Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, 171 (1970), where the record before the judge contained "strong evidence of actual guilt . . . the state had a strong case of first degree murder against Alford . . . overwhelming evidence against him . . ."; *Commonwealth v. Cottrell,* 433 Pa. 177, 249 A.2d 294 (1969), where there was "significant evidence of guilt"; *Commonwealth v. Skurkis,* 465 Pa. 257, 348 A.2d 894 (1975), where there was "other substantial evidence of guilt."

When, before sentencing, the court sought to find out if the defendant admitted making the statement to Trooper Pease that he gave his wife injections of Vitamin B-12 and meperidine, and if so, whether such statement was true, and if true, the time frame in which he gave her the injections, the defendant would not elaborate.[24]

The comment to Pa. R. Crim. P. 319 requires that a judge taking a guilty plea inquire into the factual basis for the plea. Where there is an equivocal plea, the court must take special care to make certain that there is a factual basis. A.B.A. Std. for Criminal Justice, 14 - 16—Determining Accuracy of Plea (1980).[25]

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24. N.T., Colloquy of February 28, 1983, p. 7.

25. Equivocal pleas occur where the defendant's testimony at the plea colloquy casts doubt on his plea, e.g., where the defendant recites a different

(Cont'd)

Appendix G

On the record of this case, the defendant may well have attempted to plead guilty, not because he believed himself to be guilty or that the Commonwealth could prove him guilty, but because he was fatigued, afraid and depressed, and to avoid the physical and mental rigors of a trial.[26]

There are simply too many unanswered questions. Accordingly, our proceeding under Pa. R. Crim. P. 320 in which we struck off the guilty plea and substituted a not guilty plea in its stead, was not an abuse of our discretion.[27]

We note that the defendant does not challenge the propriety of our action in striking off the guilty plea, nor does the defendant suggest that our action was an abuse of discretion. Defendant bases his position solely on double jeopardy grounds: (1) that the court had no power because of the double jeopardy provisions of the Constitution and because of section 109 of the Crimes Code,[28] to strike off the guilty plea - that such action was a nullity,

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(Cont'd)
version of the facts than those recited by the district attorney, where the defendant is unable to remember or admit essential elements of the crime or where he makes an outright denial of guilt. Equivocal Guilty Pleas — Should They be Accepted? 75 Dickinson L.R., pp. 366, 368, 369 (1971).

26. Defendant is 62 years of age, suffers from high blood pressure, and his counsel expresed the fear that if he went to trial defendant might commit suicide.

27. N.T., Proceedings of February 28, 1983, p. 7, Pa. R. Crim. P. 320 reads:

> At any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.

28. Crimes Code, Act of Dec. 6, 1972, No. 334, Section 109, effective June 6, 1973; 18 Pa. C.S.A., Section 109.

and (2) that constitutional double jeopardy considerations require that these proceedings against the defendant be dismissed.

We find the defendant's argument for dismissal frivolous. If double jeopardy in any way attaches, it will not terminate the proceedings. It, at most, would either (1) make our action in striking the guilty plea a nullity, confirm the validity of a guilty plea, and permit the court to enter judgment of sentence upon it, or (2) permit the Commonwealth to bring the defendant to trial for involuntary manslaughter. *United States v. Hecht*, 638 F. 2d 651 (3rd Cir. 1981), where the court held that the double jeopardy clause did not prevent reinstatement of the guilty plea erroneously struck off by the trial court and the entry of sentence thereon. Reinstatement of the guilty plea could do not more than place the case in the *status quo ante* that existed before the plea was vactated.

We find defendant's other argument also without merit.

Since we have found no abuse of discretion and since the defendant by not briefing nor arguing before us that our striking of the guilty plea was an abuse of discretion has in any event waived that aspect of his claim, *Commonwealth v. Roman*, 494 Pa. 440, 431 A.2d 936 (1981), our striking of it must prevail, unless section 109 of the Crimes Code is found to supersede Pa. R. Crim. P. 320, and to prohibit the striking of a guilty plea once accepted under any circumstances, or unless the double jeopardy clause prohibits the court from striking a guilty plea once accepted under any circumstances. Under the latter interpretation, Pa. R. Crim. P. 320 is, itself, unconstitutional.[29]

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29. And also, apparently, Federal Rule of Criminal Procedure 11(f) which provides: "Notwithstanding the acceptance of a plea of guilty, the court should not enter judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

Appendix G

In *Commonwealth v. Metz,* 425 Pa. 188, 191, 228 A.2d 729 (1967), Metz argued that the court had no power to strike off his guilty plea and substitute a not guilty plea in its stead. The Supreme Court rejected the defendant's contention, finding that: "In the first place, contrary to his assumption, a guilty plea may be withdrawn" pursuant to Pa. R. Crim. P. 320. Furthermore, the court held that had the trial court not ordered the guilty plea withdrawn, Metz might have successfully attacked his conviction in a subsequent proceeding by claiming his plea was not knowingly and intelligently entered.[30]

After the unfavorable decision by the Pennsylvania Supreme Court, Metz next sought a writ of habeas corpus in Federal Court. Although the District Court granted the writ, the Third Circuit reversed in *Commonwealth ex rel. Metz v. Maroney,* 404 F. 2d 233 (Court of Appeals, Third Circuit, 1968), cert. den. 394 U.S. 949 (1969). The Court of Appeals rejected the defendant's former jeopardy claim even though it treated the case "as one in which the court struck the guilty plea *without the consent of the accused.*" *Id.* at 236 (emphasis supplied).

We find that the Federal and State Court decisions involving *Metz* are precedent, and that where there is no abuse of discretion,

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30. In *Metz,* the trial judge had accepted defendant's plea to murder generally in return for the prosecutor's advising the court that the crime rose no higher than second degree murder. However, after acceptance of the plea, the court ordered the plea withdrawn when the accused testified that the shooting of his wife was accidental, not intentional. The accused was subsequently tried by a jury, found guilty of first degree murder and sentenced to life imprisonment. After an unsuccessful appeal of his conviction, Metz claimed in a P.C.H.A. proceeding that the Pa. Constitution barred the Commonwealth from prosecuting him for any offense greater than second degree murder, the charge to which he had pled.

the court has the power to strike off a guilty plea without the defendant's consent, such as where there is an insufficient factual basis for the plea or where sentencing on the plea would do injustice. The case of *United States v. Hecht,* supra, is not precedent to the contrary. In *Hecht,* the Court of Appeals found that the district judge had abused his discretion in striking off the plea, and on that basis ruled that the striking of the plea was invalid.

Accordingly, we find that the setting aside of the guilty plea in this case does not violate the double jeopardy provisions of the Pennsylvania or the United States Constitution.

We also hold, based on federal and state decisions, that our tentative acceptance of the defendant's guilty plea in this case is not an implied acquittal of the other charges pending against the defendant. *Commonwealth v. Ward,* 493 Pa. 115, 425 A.2d 401 (1981), cert. den. 451 U.S. 974; *Commonwealth v. Tabb,* 491 Pa. 372, 421 A.2d 183 (1980), cert. den. 450 U.S. 1000; *Commonwealth v. Newmiller,* 487 Pa. 410, 409 A.2d 834 (1979); *Commonwealth v. Klobuchir,* 486 Pa. 241, 405 A.2d 881 (1979), cert. den. 445 U.S. 952, reh. den. 446 U.S. 947 (1980); *Klobuchir v. Pennsylvania,* 639 F. 2d 966 (3rd Cir. 1981), cert. den. 454 U.S. 850; *Commonwealth v. Passaro,* 287 Pa. Superior Ct. 354, 430 A.2d 322 (1981).

We further find that the defendant has no claim for relief under the Crimes Code, Section 109. This section of the Crimes Code provides as follows:

> When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred

by such former prosecution under the following circumstances:

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, *or a plea of guilty accepted by the court*. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant. (Emphasis supplied.)

If this section of the Crimes Code means there is a former conviction when a guilty plea is tendered and the court says, "The guilty plea is accepted," then it is in conflict with Pa. R. Crim. P. 320.

Rule 320, as we have seen, adopted in June, 1964 and re-promulgated in June, 1977 (after the effective date of the Crimes Code), provides:

At any time before sentence the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.

This rule clearly permits a court to set aside a guilty plea prior to the imposition of sentence in the exercise of its proper discretion.

We interpret section 109 of the Crimes Code to refer only to former prosecutions which resulted in a plea of guilty which

continues to stand accepted by the court. Such a reading harmonizes with the meaning of entire subsection 3 of section 109 and with the comments to the Model Penal Code which form the basis for the Pennsylvania double jeopardy statute.

In other words, where the judgment of conviction, guilty verdict or accepted plea of guilty stands, there is a conviction for the purposes of double jeopardy statute. But, if there is a reversal or vacation of the judgment, a setting aside of the verdict or the striking of the guilty plea, there is no former jeopardy bar to further prosecution.

The Comment to Tentative Draft No. 5, section 1.09 of the Model Penal Code (1956) refers to judgments of conviction and guilty pleas still standing as barring further prosecution. "A plea of guilty accepted by the court has the same effect as a verdict of guilty *so long as it stands* and is capable of supporting a judgment; the defendant cannot be prosecuted again for the same crime." (Emphasis supplied.)

The above reading of section 109(3) eliminates the apparent conflict with Rule 320 and is more consistent with the intent of the drafters of the Model Penal Code and the language of the entire subsection.

In short, we hold that where section 109 of the Crimes Code speaks of "a guilty plea accepted by the court," it is speaking of a plea that stands and has not been stricken and does not speak to the power of the court to strike a guilty plea before sentence.

Furthermore, the Pennsylvania Constitution mandates that

a procedural rule suspends an inconsistent procedural statute.[31]

We hold Section 109 of the Crimes Code to be procedural. It does not affect the substantive rights of any litigant. Therefore, even if Section 109 of the Crimes Code is in conflict with Rule 320, Rule 320 supersedes and suspends it. Defendant's statutory double jeopardy rights are procedural, not substantive. The Supreme Court in *Commonwealth v. Sorrell,* ____ Pa. ____, 456 A.2d 1326 (1982), held that the right to trial by a jury is not a substantive right, but a right of procedure through which substantive rights are enforced. In the same manner, when the acceptance of a guilty plea is final is a procedural question. Substantive law declares what acts are crimes and prescribes the punishment for their commission. Procedural law provides the means by which the substantive law is enforced. *Commonwealth v. Wharton*, 495 Pa. 581, 435 A.2d 158 (1981), (Roberts, J., opinion in support of affirmance). We find the protection against double jeopardy is one of the rights of procedure which constitutes due process of law. It neither declares what acts are criminal nor prescribes the punishment for their commission. It is not an end

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31. The Pennsylvania Constitution, Article V, Section 10 provides:

> (a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts . . .; (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . including the power to provide for . . . the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant . . . *All laws shall be suspended to the extent that they are inconsistent with the rules prescribed under these provisions.* (Emphasis supplied.) See Pa. C.S.A., section 1722(a)(1), for the statutory version of this provision.

in itself but a means of safeguarding the substantive rights of life and liberty. Its purpose is to prevent *repeated attempts* by the state to convict an individual for alleged offenses, and while its barring of a subsequent prosecution necessarily precludes subsequent punishment, its purpose is to prevent re-trials. *Commonwealth v. Bolden,* supra, at 619-620, citing *Green v. United States,* 355 U.S. 184, 187 (1957). The fact that a right is important and substantial, does not *ipso facto* make it substantive.

Accordingly, we hold that Pa. R. Crim. P. 320 governs and is valid.

The Pennsylvania Supreme Court in re-promulgating Rule 320 in 1977 apparently reached the same conclusions with regard to Section 109 as we have. Otherwise, its action in re-promulgating the rule would have been a nullity. We will not presume the Supreme Court performed a meaningless act.

For all of the foregoing reasons, we hold that our striking of the defendant's guilty plea on February 28, 1983, was properly within our discretion, was legal and was constitutional.

BY THE COURT:

s/Forrest G. Schaeffer

APPENDIX H—MEMORANDUM OPINION DATED AUGUST 3, 1983

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA

No. 81159301 (Berks Co.)
No. 280 and 280A of 1983
(Schuylkill Co.)

COMMONWEALTH OF PENNSYLVANIA

v.

IRVIN W. GILMORE

Emmanuel H. Dimitriou, Esquire, Attorney for Defendant
Charles A. Haddad, Esquire, Special Assistant Attorney General, for the Commonwealth

Defendant has appealed from our order refusing to dismiss these proceedings against him on double jeopardy grounds.

In June 1981, the defendant, Irvin W. Gilmore, a physician, was charged and arrested for the murder of his wife, Patricia, for aggravated assault upon her and for recklessly endangering her life. She had been found dead in the bed she shared with him Thanksgiving Day morning, November 27, 1980.

On October 23, 1981, he waived arraignment. On September 3, 1982, the court held a hearing on defendant's motions for habeas corpus and to suppress evidence, and on January 7, 1983, denied the motions and called the case for trial.[1]

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1. The delay between arraignment and the final disposition of the pretrial motions resulted from the Commonwealth and the defendant agreeing to wait (Cont'd)

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The defendant tendered a plea of guilty to involuntary manslaughter and the court received it by saying on the record: "The guilty plea is accepted."[2] After carefully reviewing the record, on February 28, 1983, the court determined that the guilty pleas was inappropriate, directed it be withdrawn, substituted a not guilty plea in its stead pursuant to Pa. R. Crim. P. 320, and scheduled the case for trial. Defendant, in March, 1983, sought and obtained a change of venue and then on May 26, 1983, moved to dismiss the proceedings on double jeopardy grounds. This court denied the motion to dismiss and the defendant immediately filed an interlocutory appeal with the Superior Court pursuant to the rule laid down by our Supreme Court in *Commonwealth v. Bolden,* 472 Pa. 602, 373 A. 2d 90 (1977).

Defendant argues that since defendant tendered a guilty plea to involuntary manslaughter and since the court stated "The guilty plea is accepted," the defendant, on the facts of this case, cannot be brought to trial and all charges against him must be dismissed.

The Commonwealth's evidence presented at the preliminary hearing, and made a part of the record at the habeas corpus hearing, was to the effect that the defendant and his wife had been to a party on Thanksgiving Eve with defendant's son and daughter-in-law, that they returned at approximately 12:30 a.m. on Thanksgiving morning, that defendant and his son retired, that defendant's daughter-in-law then retired at about 2:00 a.m.,

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(Cont'd)

for the transcription of the preliminary hearing testimony, to fix a pretrial hearing date suitable to both counsel, to wait for the transcription of the pretrial hearing testimony and to prepare briefs and argue the pretrial issues. The defendant requested the continuances and waived his Rule 1100 rights.

2. N.T., Hearing of January 10, 1983, p. 22.

and that at or about 8:00 a.m. that same morning, defendant found his wife dead beside him.[3]

The Commonwealth's evidence relative to the autopsy revealed that defendant's wife had a blood alcohol content of 0.23 or 0.24,[4] that she suffered numerous bruises about the left hand, head, and face from a blunt object,[5] and that she had been injected four to six times in the buttocks at two separate site areas,[6] that in each of these two site areas meperidine had been injected,[7] that the injections were in her buttocks in an area where it was unlikely she would have injected herself,[8] that she died from a combination of alcohol and meperidine,[9] and that the amount of meperidine in her system was 2.90 micrograms per milliliter

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3. Statement of December 11, 1980, pp. 4, 5, 23.

4. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, pp. 35, 61; testimony of Isidore Mihalakis, M.D., Hearing before District Judge Shultz, August 10, 1981, p. 4.

5. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, pp. 11 - 16, 22 - 24, 39.

6. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, pp. 5, 6; testimony of Isidore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, p. 42.

7. Testimony of John Ingalls Keith, M.D., Hearing before District Judge Shultz, July 29, 30, 1981, pp. 35, 69, 70.

8. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, pp. 5, 6; testimony of Isidore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, pp. 55, 56, 58.

9. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, p. 35; testimony of Isidore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, p. 3, 4.

of blood, a toxic amount and sufficient to cause death.[10] The Commonwealth's evidence included a statement by the defendant that he had given his wife injections of vitamin B-12 and meperidine for her diarrhea and nausea.[11] The Commonwealth's evidence also included another statement from the defendant, "I have what killed her. It's Lomotil,"[12] and a contradictory statement, "Patty (defendant's wife) died from an overdose of Demerol (i.e. meperidine)."[13] Defendant also said in his statement to the district attorney that his wife could not take Demerol (i.e. meperidine), that she got sick on it, that another doctor, one Dr. Menges, had told her it was a "no, no," and that he, defendant, had never known her to give herself a shot.[14]

The Commonwealth's experts did not rule out that defendant's wife could have fallen several times. She also could have been involved in a fight with defendant's daughter-in-law or son, and she could have injected herself with some or all of the meperidine. Defendant had said in his statement to the district attorney that his wife self-medicated herself with Lomotil, knew how to fill a syringe, and that she had brought his medicine bag from the car to the bedroom.[15] She may have self-injected the meperidine.

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10. Testimony of John Ingalls Keith, M.D., Hearing before District Justice Shultz, July 29, 30, 1981, p. 35; testimony of Isidore Mihalakis, M.D., Hearing before District Justice Shultz, August 10, 1981, pp. 35, 36.

11. N.T., Pretrial hearing of September 3, 1983, p. 63.

12. N.T., Pretrial hearing of September 3, 1983, p. 33.

13. Testimony of Barry Pease, Hearing before District Justice Shultz, July 29, 30, 1981, p. 37.

14. Statement of December 11, 1980, pp. 6, 15, 16.

15. Oral Statement of December 11, 1980, pp. 4, 16, 27 - 29.

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The defendant's alleged statement to Trooper Pease is not necessarily inculpatory. Without knowing when and how many injections defendant admitted administering, a factfinder would be free to find that such injections by a physician were lawful and proper.

The defendant could have injected his wife with meperidine, but could have done so without an intent to kill her and without the recklessness or gross negligence required for involuntary manslaughter.

Although some of defendant's alleged statements were contradicted by his other statements or by what his attorney said at the guilty plea colloquy - he allegedly told Chief Smith, "I have what killed her. It's Lomotil,"[16] and then allegedly told Trooper Pease, "Patty (defendant's wife) died from an overdose of Demerol (i.e. meperidine)"[17] he allegedly told Trooper Pease he gave her "injections of vitamin B-12 and meperidine,"[18] and his attorney told the court "defendant has no recollection of injecting his wife with meperidine"[19] - these statements by defendant, if found by the factfinder to have been made, do not necessarily prove, or indicate, guilt. They are also consistent with a befuddled and confused mind, or explained by information learned by defendant at a later point in time.

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16. N.T. Pretrial Hearing of September 3, 1983, p. 63.

17. Testimony of Barry Pease, Hearing before District Justice Shultz, July 29, 30, 1981, p. 37.

18. Testimony of Barry Pease, Hearing before District Justice Schultz, July 29, 30, 1981, p. 37.

19. N.T. Plea of Guilty, pp. 7, 8.

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In his statements to Chief Smith, the district attorney and Trooper Pease, defendant never admitted that he had killed his wife or intended to kill her.

A trier of fact could find the Commonwealth's evidence insufficient to prove how defendant's wife got the bruises or who injected her with meperidine.

On January 10, 1983, before the start of the *voir dire*, counsel for the defendant and the Commonwealth informed the court that the defendant would tender a plea of involuntary manslaughter, if the other charges against the defendant were dismissed. Defense counsel informed the court in the presence of the defendant that the defendant "recognizes the possibility that he (defendant) may have injected meperidine in accordance with the statement which has been admitted (i.e., not suppressed) by the court," and that defendant is "stating that he has no recollection of injecting his wife with meperidine or any of the acts related to this incident as a result of his consumption of alcohol and the physical exhaustion at the time," and that defendant was entering the plea because he had concluded, after getting advice from his counsel, that it would be in his best interests to do so.[20]

However, defense counsel was adamant that even though defendant desired to plead guilty, he was not admitting that he had killed his wife.[21]

Defendant, himself, stated to the court that he understood

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20. N.T. Plea of Guilty, pp. 7, 8.

21. N.T., Plea of Guilty, pp. 9, 10, 19, 20.

the facts set out by respective counsel, that he neither wanted to contradict nor challenge the statements made by counsel, and that he "would just like to concur with my attorney . . ."[22]

The Commonwealth took the rather peculiar position that so long as defendant denied injecting his wife with meperidine, it would make him stand trial for murder, but that if defendant would retract his denial and admit he was responsible for his wife's death, that admission would somehow satisfy it that the appropriate charge was involuntary manslaughter.[23]

The Commonwealth also asserted that if the case went to trial, it "most likely would not obtain any verdict higher than involuntary manslaughter."[24]

Although no plea bargain was stated on the record, the court advised the defendant at the time the guilty plea was tendered, that the court was not bound by the terms of any plea bargain that might exist.[25]

In accepting a guilty plea, the court has a duty to the public and to the defendant. On the one hand, it should not permit the defendant, if guilty of a more serious crime, to avoid the full consequences of his act by pleading guilty to a lesser crime. On the other hand, it should not allow him, if innocent, to plead guilty. If a defendant refuses to admit his guilt and there is an

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22. N.T., Plea of Guilty, pp. 8, 9.

23. N.T., Hearing of February 28, 1983, pp. 3, 4.

24. N.T., Hearing of February 28, 1983, p. 4.

25. N.T., Plea of Guilty, pp. 11, 12.

uncertain factual basis for the plea, in fairness and justice to the defendant, no guilty plea should be accepted.

We find both the public and the defendant are best served by striking, and refusing final acceptance of, the guilty plea.

While we found that there was sufficient circumstantial evidence to permit a factfinder to find the defendant guilty of murder,[26] we also find that there is an inadequate factual basis to support the defendant's equivocal guilty plea. An adequate factual basis to support an equivocal guilty plea is not the same as, and should not be confused with, the evidence required to sustain a verdict after trial. A finding of an insufficient factual basis to accept a guilty plea is not the equivalent, and is in no way similar, to a verdict of not guilty. The defendant may properly be convicted at trial even though a sufficient factual basis was not established for a guilty plea. This is so because conflicts among sources of information used to establish the factual basis for a guilty plea could preclude the judge from accepting the guilty plea, but a factfinder might accept evidence tending to prove guilt and properly draw inferences against the defendant thereform and reject evidence and inferences favoring the defendant. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?* 126 U. Pa. L. Rev. 88, 98 (1977).

Federal and state case law supports the acceptance of an equivocal guilty plea only where there is stong evidence of guilt. *See N. Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, 171 (1970), where the record before the judge contained "strong evidence of actual guilt . . . the state had a strong case of first degree murder against Alford . . . overwhelming evidence against him . . ."; *Commonwealth v. Cottrell,* 433 Pa. 177, 249

26. Illegible.

A.2d 294 (1969), where there was "significant evidence of guilt"; *Commonwealth v. Skurkis,* 465 Pa. 257, 348 A.2d 894 (1975), where there was "other substantial evidence of guilt."

When, before sentencing, the court sought to find out if the defendant admitted making the statement to Trooper Pease, if it was true, and if so, the time frame in which he gave his wife the vitamin injection, defendant would not elaborate.[27]

With defendant refusing to admit even that he gave his wife an injection of meperidine in conjunction with a vitamin, we find there is a totally inadequate factual basis on which to support a guilty plea to involuntary manslaughter. The comment to Pa. R. Crim. P. 319 requires that a judge taking a guilty plea inquire into the factual basis for the plea. Where there is an equivocal plea, the court must take special care to make certain that there is a factual basis. A.B.A. Std. for Criminal Justice, 14 - 1.6 - *Determining Accuracy of Plea* (1980).[28]

On the record of this case, the defendant may well have attempted to plead guilty, not because he believed himself to be guilty or that the Commonwealth could prove him guilty, but because he was fatigued, afraid and depressed, and to avoid the physical and mental rigors of a trial.[29]

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27. N.T., Colloquy of February 28, 1983, p. 7.

28. Equivocal pleas occur where the defendant's testimony at the plea colloquy casts doubt in his plea, e.g., where the defendant recites a different version of the facts than those recited by the district attorney, where the defendant is unable to remember or admit essential elements of the crime, or where he makes an outright denial of guilt. *Equivocal Guilty Pleas - Should They be Accepted?* (illegible)

29. Defendant is 62 years of age, suffers from high blood pressure, and his counsel expressed the fear that if he went to trial, defendant might commit suicide.

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There are simply too many unanswered questions. Accordingly, our proceeding under Pa. R. Crim. P. 320 in which we struck off hte guilty plea and substituted a not guilty plea in its stead, was not an abuse of our discretion.[30]

We note that the defendant does not challenge the propriety of our action in striking off the guilty plea, nor does the defendant suggest that our action was an abuse of discretion. Defendant bases his position solely on double jeopardy grounds: (1) that the court had no power because of the double jeopardy provisions of the Constitution and because of section 109 of the Crimes Code,[31] to strike off the guilty plea - that such action was a nullity, and (2) that constitutional double jeopardy considerations require that these proceedings against the defendant be dismissed.

We find the defendant's argument for dismissal frivolous. If double jeopardy in any attaches it will not terminate the proceedings. It, at most, would either (1) make our action in striking the guilty plea a nullity, confirm the validity of the guilty plea, and permit the court to enter judgment of sentence upon it, or (2) permit the Commonwealth to bring the defendant to trial for involuntary manslaughter. *United States v. Hecht*, 638 F. 2d 651 (3rd Cir. 1981), where the court held that the double jeopardy clause did not prevent reinstatement of the guilty plea erroneously struck off by the trial court and the entry of sentence thereon. Reinstatement of the guilty plea could do no more than

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30. N.T., Proceedings of February 28, 1983, p. 7. Pa. R. Crim. P. 320 reads: "At any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted."

31. Crimes Code, Act of Dec. 6, 1972, No. 334, Section 109, effective June 6, 1973; 18 Pa. C.S.A., Section 109.

place the case in the *status quo ante* that existed before the plea was vacated.

We find defendant's other argument also without merit.

Since the defendant has not argued that the striking of the guilty plea was improper or an abuse of discretion, our striking of it must prevail, unless section 109 of the Crimes Code is found to supersede Pa. R. Crim. P. 320, and to prohibit the striking of a guilty plea once accepted under any circumstances, or unless the double jeopardy clause prohibits the court from striking a guilty plea once accepted under any circumstances. Under the latter interpretation, Pa. R. Crim. P. 320 is, itself, unconstitutional.

In *Commonwealth v. Metz,* 425 Pa. 188, 191, 228 A.2d 729 (1968), Metz argued that the court had no power to strike off his guilty plea and substitute a not guilty plea in its stead. The Supreme Court rejected the defendant's contention, finding that: "In the first place, contrary to his assumption, a guilty plea may be withdrawn" pursuant to Pa. R. Crim. P. 320. Furthermore, the court held that had the trial court not ordered the guilty plea withdrawn, Metz might have successfully attached his conviction in a subsequent proceeding by claiming his plea was not knowingly and intelligently entered.[32]

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32. In *Metz*, the trial judge had accepted defendant's plea to murder generally in return for the prosecutor's advising the court that the crime rose no higher than second degree murder. However, after acceptance of the plea, at a subsequent hearing to determine the degree of guilt, the court ordered the plea withdrawn when the accused testified that the shooting of his wife was accidental, not intentional. The accused was subsequently tried by a jury, found guilty of first degree murder and sentenced to life imprisonment. After an unsuccessful appeal of his conviction, Metz claimed in a P.C.H.A. proceeding that the Pa. Constitution barred the Commonwealth from prosecuting him for any offense greater than second degree murder, the charge to which he had pled.

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After the unfavorable decision by the Pennsylvania Supreme Court, Metz next sought a writ of habeas corpus in Federal Court. Although the District Court granted the writ, the Third Circuit reversed in *Commonwealth ex rel Metz v. Maroney,* 404 F. 2nd 233 (Court of Appeals, Third Circuit, 1968) cert den. 394 U.S. 949 (1969). The Court of Appeals rejected the defendant's former jeopardy claim even though it treated the case "as one in which the court struck the guilty plea *without the consent of the accused.*" Id. at 236 (emphasis supplied).

We find that the Federal and State Court decisions involving Metz are precedent, and that where there is no abuse of discretion, the court has the power to strike off a guilty plea without the defendant's consent, such as where there is an insufficient factual basis for the plea or where sentencing on the plea would do injustice. The case of *United States v. Hecht,* supra., is not precedent to the contrary. In *Hecht*, the Court of Appeals found that the district judge had abused his discretion in striking off the plea, and on that basis ruled that the striking of the plea was invalid. As we have noted, the Court of Appeals in *Hecht* permitted the reinstatement of the guilty plea which the district judge had stricken. Here where the defendant has not alleged or argued an abuse of discretion, the issue presented in *Hecht* is not present.

Accordingly, we find that the setting aside of the guilty plea in this case does not violate the double jeopardy provisions of the Pennsylvania or the United States Constitutions.

We also hold, based on federal and state decision, that our tentative acceptance of the defendant's guilty plea in this case is not an implied acquittal of the other charges pending against the defendant. *Commonwealth v. Ward,* 493 Pa. 115, 425 A.2d

401 (1981) cert. den. 451 U.S. 974; *Commonwealth v. Tabb,* 491 Pa. 372, 421 A.2d 183 (1980) cert. den. 450 U.S. 1000; *Commonwealth v. Newmiller,* 487 Pa. 410, 409 A.2d 834 (1979); *Commonwealth v. Klobuchir,* 486 Pa. 241, 405 A.2d 881 (1979), cert. den. 445 U.S. 952, reh. den. 446 U.S. 947 (1980); *Klobuchir v. Pennsylvania,* 639 F. 2nd 966 (3rd Cir. 1981) cert. den. 454 U.S. 850; *Commonwealth v. Passaro,* 287 Pa. Super. 354, 430 A.2d 322 (1981).

We further find that the defendant has no claim for relief under the Crimes Code, Section 109. This section of the Crimes Code provides as follows:

> "When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:
>
> (3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, *or a plea of guilty accepted by the court.* In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant." (emphasis supplied.)

If this section of the Crimes Code means that a guilty plea is accepted when it is tendered and the court says, "The guilty plea is accepted," then it appears to be in conflict with Pa. R. Crim. P. Rules 319 and 320. Rule 319(a) mandates judicial caution

in accepting a guilty plea, saying:

> "The judge may refuse to accept a guilty plea and shall not accept it unless he determines after inquiry of the defendant that the guilty plea is voluntarily tendered."

Rule 320, as we have seen, adopted in June, 1964 and re-promulgated in June, 1977 (after the effective date of the Crimes Code), provides:

> "At any time before sentence the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted."

These rules clearly permit a court to set aside a guilty plea prior to the imposition of sentence in the exercise of its proper discretion.[33]

We interpret section 109 of the Crimes Code to refer only to former prosecutions which resulted in a plea of guilty which continues to stand accepted by the court. Such a reading harmonizes with the meaning of entire subsection 3 of section 109 and with the comments to the Model Penal Code which from the basis for the Pennsylvania double jeopardy statute.

In other words, where the judgment of conviction, guilty

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33. Pa. Rules 319 and 320 are in conformity with the Federal Rules of Criminal Procedure. Federal Rule 11(f) provides: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

verdict or accepted plea of guilty stands, there is a conviction for the purposes of the double jeopardy statute. But, if there is a reversal or vacation of the judgment, a setting aside of the verdict or the striking of the guilty plea, there is no former jeopardy bar to further prosecution.

The Comment to Tentative Draft No. 5, section 1.09 of the Model Penal Code (1956) refers to judgments of conviction and guilty pleas still standing as barring further prosecution. "A plea of guilty accepted by the court has the same effect as a verdict of guilty *so long as it stands* and is capable of supporting a judgment, the defendant cannot be prosecuted again for the same crime." (emphasis supplied.)

The above reading of section 109(3) eliminates the apparent conflict with Rule 320 and better harmonizes with the intent of the draftors of the Model Penal Code and the language of the entire subsection.

In short, we hold that where section 109 of the Crimes Code speaks of "a guilty plea accepted by the court," it is speaking of a plea that stands and has not been stricken and does not speak to the power of the court to strike a guilty plea before sentence.

The Pennsylvania Supreme Court in re-promulgating Pa. R. Crim. P. 320 in 1977, either came to the same conclusion, or intended to supersede that provision of the Crimes Code.[34]

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34. The Pennsylvania Constitution, Article V, section 10 provides:

"(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts . . . ; (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . , including the power to provide for . . . the administration of all

(Cont'd)

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We hold Pa. R. Crim. R. 320 to be a procedural rule. It does not affect the substantive rights of any litigant. It merely makes the acceptance of a guilty plea tentative until a court finally accepts it by entering sentence thereon. Therefore, even if section 109 of the Crimes Code is in conflict with Rule 320, Rule 320 supersedes and suspends it. Defendant's statutory double jeopardy rights are procedural, not substantive. The Supreme Court in *Commonwealth v. Sorrell,* ____Pa.____, 456 A.2d 1326 (1982), held that the right to trial by a jury is not a substantive right, but a right of procedure through which substantive rights are enforced. In the same manner, when the acceptance of a guilty plea is final, is a procedural right. Substantive law declares what acts are crimes and prescribes the punishment for their commission. Procedural law provides the means by which the substantive law is enforced. *Commonwealth v. Wharton,* 495 Pa. 581, 435 A.2d 158 (1981), Roberts, J., opinion in support of affirmance. We find the protection against double jeopardy is one of the rights of procedure which constitutes due process of law. It neither declares what acts are criminal nor prescribes the punishment for their commission. It is not an end in itself but a means of safeguarding the substantive rights of life and liberty. Its purpose is to prevent *repeated attempts* by the state to convict an individual for alleged offenses, and while its barring of a subsequent prosecution necessarily precludes subsequent punishment, its purpose is to prevent re-trials. *Commonwealth v. Bolden, supra,* at 619-620, citing *Green v. United States,* 355 U.S. 184, 187 (1957).

(Cont'd)

courts and supervision of all officers of the judicial branch, if such rules are consistent with the Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant . . . *All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.*" (emphasis supplied.) See 42 Pa. C.S.A., section 1722(a)(1), for the statutory version of this provision.

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The fact that a right is important and substantial, does not require it to be substantive.

Accordingly, we hold that Pa. R. Crim. P. 320 governs and specifically authorizes the striking of defendant's guilty plea in this case.

For all of the foregoing reasons, we hold that our striking of the defendant's guilty plea on February 28, 1983, was properly within our discretion, was legal and was constitutional.

BY THE COURT:

s/ Forrest G. Schaeffer

APPPENDIX I—TRANSCRIPT OF PLEA AND SENTENCE DATED FEBRUARY 28, 1983

In the Court of Common Pleas of Berks County,
Pennsylvania : Criminal

COMMONWEALTH OF PENNSYLVANIA

vs.

IRVIN W. GILMORE

No. 81159301

COLLOQUY RE: PLEA and SENTENCE
Monday, February 28, 1983
Reading, Pennsylvania

Before THE HONORABLE FORREST C. SCHAEFFER, Judge

APPEARANCES:

For the Commonwealth:
CHARLES A. HADDAD, ESQUIRE
Special Assistant Attorney General
267 Penn Avenue
Wernersville, Pennsylvania

For the Defendant:
EMMANUEL H. DIMITRIOU, ESQUIRE
522 Court Street
Reading, Pennsylvania

DISTRIBUTION:
Original filed with the Clerk of Common Pleas Criminal, and copies to each attorney.

Appendix I

Peggy C. Phillips
Official Court Reporter

(Reading, Pennsylvania, Monday, February 28 1983, at 9:30 a.m.)

(The defendant is present.)

THE COURT: Good morning.

MR. HADDAD: Good morning. Your Honor.

THE COURT: This is the time set for further proceedings in the matter of Commonwealth versus Gilmore. The last stage, gentlemen, I believe, that there was a colloquy that there was a plea of guilty to involuntary manslaughter entered, but there was no plea bargain yet agreed upon, because it was conditional upon the obtaining of certain psychiatric testimony.

Are you now prepared, gentlemen, to state what the plea bargain, if any, is?

MR. HADDAD: Yes, Your Honor.

THE COURT: Put it on the record.

MR. HADDAD: If the Court please, the Commonwealth will accept a plea to involuntary manslaughter, it being the position of the Commonwealth that the fact situation which has developed is most appropriate to that charge. Namely, that the defendant while intoxicated administered meperidine to the decedent, Patricia Gilmore, who was also intoxicated.

It is the position of the Commonwealth as stated by their

pathologist and medical experts that the cause of death was the combination of the meperidine and alcohol. It is the position of Dr. Mihalakis that the meperidine in and of itself was not an independent cause of death, but that the meperidine with the alcohol did cause the death.

It is the position of the Commonwealth, your Honor, which was our position from the time I entered this case, that the nature of the charges rose to the degree of homicide charge only because the defendant denied in a statement given to the District Attorney's Office before my involvement that he in any way administered the dose of meperidine. It was only after that statement that the Commonwealth learned that the defendant gave a statement to Trooper Barry Pease that he did give meperidine, and I felt at that time, and all along in this case, and discussed fully with the police and Attorney General's Office that if at any time the defendant would retract and recant that statement of denial, that the Commonwealth's case would most appropriately be that of involuntary manslaughter.

By the defendant entering a plea as he did on January 10th, 1985, to the charge of involuntary manslaughter, I feel he has effectively withdrawn his denial, and he is admitting to the facts presented by the Commonwealth that he was the person responsible for the death of Patricia Gilmore.

I also feel that with the removal of the denial that he was involved, that the Commonwealth's case would not rise to the degree of guilt which we originally charged, and that if gone to trial, the Commonwealth most likely would not obtain any verdict higher than involuntary manslaughter, and it's for that reason I felt most prudent and advisable to accept the plea to involuntary manslaughter.

I will say that that plea was accepted only after discussing it with the Attorney General's Office for whom I am representing, and also discussing it with Chief Harley Smith and Detective Barry Hadley of the Muhlenberg Township Police, and all the parties with whom I have discussed it have agreed to that charge.

In regard to the recommendation of the Commonwealth regarding the sentence to be imposed, I also discussed that with the same parties, Attorney General's Office, Chief Smith, Detective Barry Hadley, and it was our recommendation at the time that in the event the defendant could show supporting facts of a medical condition which would cause incarceration to be harmful, that we would not recommend a prison term, but that in lieu of prison term there would be a fine for the maximum amount of the offense charged.

THE COURT: Which is?

MR. HADDAD: $10,000.

THE COURT: Proceed.

MR. HADDAD: And that there be a sentence of probation with community service in lieu of imprisonment. I think in complete review of this case that the position of the Commonwealth is appropriate.

THE COURT: How long is the period of probation to be?

MR. HADDAD: Your Honor, the maximum term under the charge is five years.

THE COURT: Mr. Dimitriou, is that the plea bargain that you have agreed to?

MR. DIMITRIOU: That is correct, Your Honor.

THE COURT: I would like to hear from the prosecutor in the case, whether he has been a party to the plea bargain, and whether he agrees to it.

DETECTIVE BARRY HADLEY: Your Honor, we were counseled by Attorney Haddad relative to this matter, and the position of Muhlenberg Township is that we agree with Mr. Haddad.

THE COURT: Very well. Gentlemen, I have read the adult probation and parole department's presentence report in this matter. I have also read the report of Dr. Robert L. Sadoff, M.D., who is a forensic psychiatrist in Jenkintown who examined Dr. Gilmore. Also reviewed very carefully the evidence presented.

Gentlemen, I will not accept the plea bargain. Mr. Dimitriou you have a choice of permitting the plea to be an open plea, in which case I will sentence in accordance with the law as I feel proper, or you may withdraw your guilty plea, and I will give you a period of time to discuss this matter with your client and to inform me of what decision you make.

MR. DIMITRIOU: Thank you, your Honor.

THE COURT: Very well. We'll be in recess.

(Recess declared from 9:45 a.m. until 10:05 a.m.)

THE COURT: Mr. Dimitriou, what is the decision of your client?

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MR. DIMITRIOU: If it please the Court, we have reviewed this matter. It is our decision to stand on the plea as we entered it on January the 10th, 1983, and to ask the Court to proceed with sentencing at this time.

THE COURT: Gentlemen, do you understand that that then becomes an open plea?

MR. DIMITRIOU: I understand.

THE COURT: And therefore the Court could sentence to anything permitted by law?

MR. DIMITRIOU: We understand.

THE COURT: And that you wouldn't on that basis have a ground to withdraw the plea?

MR. DIMITRIOU: I understand.

THE COURT: Let me ask Dr. Gilmore. I think these are some important factors that I should understand.

First, Mr. Reist, would you swear the defendant?

(The defendant is sworn.)

THE COURT: Dr. Gilmore, Trooper Pease has stated in his report that you admitted to him that you gave your wife vitamin B-12 and meperidine. Do you recall making that statement to him, or do you deny making it to him, or do you admit making it to him?

Appendix I

MR. DIMITRIOU: Your Honor, if it please the Court, I have advised Dr. Gilmore that in line with the plea as we have entered it, I don't think that those matters are relevant at this time. We have entered a plea on the record. We have stated our position on the record, and I do not believe that it's appropriate to develop into anything else other than what is pertinent at this time, which is the sentence.

THE COURT: Well, then that makes it very easy, Mr. Dimitriou. Then in accordance with Rule 320 of the Rules of Criminal Procedure, the guilty plea is struck off. A not guilty plea is entered for the defendant, and he will stand trial. Trial is fixed for March the 21st, 1983.

MR. DIMITRIOU: If it please the Court, before the Court proceeds, I'd like to know why the Court is taking the position that he's taking, and I would like to confer with Dr. Gilmore. I've merely stated my position. That doesn't mean that he would not respond.

THE COURT: Mr. Dimitriou, there are too many unanswered questions in this whole matter, and therefore, I think the appropriate procedure is that the matter go to trial, and that's why I struck the guilty plea.

MR. DIMITRIOU: Your Honor- - -

THE COURT: Court is adjourned.

(Whereupon the proceedings were concluded at 10:08 a.m.)

APPENDIX J—TRANSCRIPT OF PLEA OF GUILTY DATED JANUARY 10, 1983

In the Court of Common Pleas of Berks County, Pennsylvania
Criminal

COMMONWEALTH OF PENNSYLVANIA

vs.

IRVIN GILMORE

No. 81159301

PLEA OF GUILTY
Monday, January 10. 1983
Reading, Pennsylvania

Before THE HONORABLE FORREST G. SCHAEFFER, Judge

APPEARANCES:

For the Commonwealth:
CHARLES A. HADDAD, ESQUIRE
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For the Defendant:
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Reading, Pennsylvania

DISTRIBUTION:
Original filed with the Clerk of Common Pleas—Criminal, and copies to each attorney.

Appendix J

Rachelle D. Hirneisen
Official Court Reporter

(Reading, Pennsylvania, Monday, January 10, 1983, at 3:30 p.m.)

(The defendant is present.)

THE COURT: Mr. Haddad and Mr. Dimitriou, are we ready to proceed?

MR. HADDAD: Yes. we are, Your Honor. Your Honor, this morning the Commonwealth moved for trial in the case of Commonwealth versus Gilmore. In the interim time, it is my understanding that the defendant will enter a plea to the charge of involuntary manslaughter and based on the entry of the plea, the Commonwealth will later on make a motion to other various charges.

If the Court would like the factual background into this case, I can deliver one to the Court.

THE COURT: I wish to have a factual background. I also want a full colloquy with the defendant.

MR. HADDAD: Yes, sir.

THE COURT: Mr. Lord, would you swear the defendant?

(The defendant is sworn.)

THE COURT: Let me first ask Dr. Gilmore some preliminary questions and then we will get into the factual basis of the matter.

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Dr. Gilmore, do you speak, understand, read and write the English language?

THE DEFENDANT: Yes. I do.

THE COURT. Have you taken any alcoholic beverages including beer or wine or taken any medicine or drugs within the last 48 hours?

THE DEFENDANT: Yes. I took a blood pressure tablet this morning.

THE COURT: Does this in any way affect your ability to understand what is proceeding at this time?

THE DEFENDANT: No, sir.

THE COURT: Have you ever been treated for mental or emotional illness?

THE DEFENDANT: No.

THE COURT: How old are you, Doctor?

THE DEFENDANT: 60.

THE COURT: How far did you go in school? Tell us your educational background.

THE DEFENDANT: I graduated from high school, Lehigh University, Jefferson Medical College.

THE COURT: What year did you graduate from Jefferson?

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THE DEFENDANT: 1951.

THE COURT: And you have a degree from Jefferson of what?

THE DEFENDANT: MD.

THE COURT: You are self-employed?

THE DEFENDANT: Yes.

THE COURT: As a practicing physician?

THE DEFENDANT: Correct.

THE COURT: Doctor, you are charged, among other things, with the offense of involuntary manslaughter. I'm going to tell you the elements of this offense at this time.

The elements are that the person charged unintentionally caused the death of another person. Next, that the death was the direct result of that person's act. A person is not liable unless his act was the direct cause of death. However, there may be more than one direct cause of death. Next, that the person's act was a lawful act done in a reckless or grossly negligent manner or an unlawful act done in a reckless or grossly negligent manner.

This means either that the person was aware of and consciously disregarded a substantial and unjustifiable risk that death would result from his conduct or that he should have been aware of such a risk. The risk must be of such a nature and degree that disregard of it or failure to perceive it constituted a gross deviation from the standard of conduct or care that a reasonable

person, considering the experience, education and background of the person involved and the circumstances that then and there existed would have observed in the situation.

Finally, the victim's conduct did not in any way diminish the other person's responsibility as to the legal cause of death. In other words, that the victim did not act in such a manner as to preclude calling the actor's act reckless or grossly negligent.

If each one of these elements has been established by the Commonwealth beyond a reasonable doubt, then that is sufficient to establish guilt of involuntary manslaughter. I point out Doctor, that before you could be found guilty of involuntary manslaughter, the jury would have to find each of those elements existed beyond a reasonable doubt.

I would now like to ask what are the facts out of which this charge arose?

MR. HADDAD: May it please the Court, on the morning of November 28th, 1980, the decedent wife of the defendant, Patricia Gilmore, was discovered dead in her bed. A later examination at the Reading Hospital by Dr. John Keith, together with toxicology examinations by Dr. Fredric Reiders, revealed that the decedent had received multiple injections of a drug known as meperidine. In addition, the blood alcohol level of the defendant was such—

THE COURT: Of the defendant?

MR. HADDAD: I'm sorry. Of the decedent was .23 which we recognize as being way above the legal definition of intoxication in Pennsylvania. It was the conclusion of Dr. Reiders and Dr.

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Keith and later of Dr. Isador Mihalakis that the cause of death was the combination of alcohol and meperidine, exact cause of death being poisoning by alcohol and meperidine.

The level of the meperidine in the blood system of the decedent was 2.9 micrograms per milliliter. It does fall within the range of known fatal dosage, and based on that blood alcohol level and the state of medical knowledge known at the time, it was the conclusion of all of the Commonwealth witnesses and experts who would appear at trial, they would conclude that the cause of death was meperidine poisoning together with the alcohol.

Your Honor, in connecting the defendant with the cause of death, the Commonwealth would produce testimony, which would be statements made by the defendant to Chief Harley Smith, Muhlenberg Township Police, and Trooper Barrie Pease; and those statements would show that the defendant was drinking alcoholic beverages a short time prior to the death, that the decedent was drinking alcoholic beverages, and further, that the defendant made a statement to Trooper Pease that he gave the defendant (sic) injection or injections of a vitamin and meperidine. Further questioning of the defendant by Chief Harley Smith, the defendant denied at all times that he gave the defendant (sic) any injections.

It is the statement made to Trooper Pease that he gave the injection, together with the denial made to Chief Harley Smith and the absence of any other explanation as to the injections being received by the decedent that the Commonwealth brought the charges against the defendant.

If the Court please, based upon the state of the defendant's condition, that of intoxication together with his not denying at this time that he gave the injections, the Commonwealth will accept

a plea to the charge of involuntary manslaughter.

I have no further statements.

THE COURT: Mr. Dimitriou, do you have any comment on the statement of facts as given by the Special Attorney General?

MR. DIMITRIOU: Your Honor, if it please the Court, I have reviewed this matter with Dr. Gilmore. I understand and he understands that the statements made by Mr. Haddad are those which the Commomwealth would tend to prove at and would attempt to prove at the time of trial.

I would like to state for the record that the evidence would show that in fact Dr. Gilmore and his wife were at a party the night before, that he had consumed intoxicating beverages, that he was extremely physically exhausted at the time, that he recognizes the possibility that he may have injected meperidine in accordance with the statement which has been admitted by the Court.

I would further like to state for the record that although Dr. Gilmore is not denying — or let me correct that. The statement as set forth by Mr. Haddad that at this time he is not denying should be elaborated upon in this respect: That he is stating he has no recollection of injecting his wife with meperidine or any of the acts related to this incident as a result of his consumption of alcohol amd the physical exhaustion at the time.

He is entering his plea because he has concluded, after advice from counsel, that it would be to his best interests to enter the plea of guilty to involuntary manslaughter.

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THE COURT: Dr. Gilmore, do you understand the facts that Mr. Haddad has just set forth on the record here in your presence?

THE DEFENDANT: Yes.

THE COURT: Do you understand the additional facts that your counsel, Mr. Dimitriou, has added to them?

THE DEFENDANT: Yes.

THE COURT: Is there anything that you would like to add to what has been said as to the factual situation out of which these charges arose?

THE DEFENDANT: I would just like to concur with my attorney, Mr. Dimitriou.

THE COURT: Is there anything you wish to contradict in which Mr. Haddad or Mr. Dimitriou said as to how this incident happened?

THE DEFENDANT: No.

THE COURT: Is there anything you wish to challenge?

THE DEFENDANT: No.

THE COURT: Do you understand that by pleading guilty you are admitting, for the purpose of this proceeding, that you can be sentenced and treated just as though you had fully admitted that you had done acts which resulted in your wife's death?

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MR. DIMITRIOU: If it please the Court, I think Your Honor used the word that he admitted. I think you are asking him if he agrees that he could be sentenced—

THE COURT: I tried very carefully not to say that he was admitting but that he understands that by, let's say agreeing with what the situation is as Mr. Haddad and you have set it forth, that he is putting himself in the same position, as far as a sentence is concerned, as though he admitted. In other words, he's pleading guilty.

MR. DIMITRIOU: He's agreeing that by entering his plea of guilty he's waiving his right to a jury trial and proceeding with the guilty plea and that that puts him in the same position where the Court can sentence him as if he were making an admission. I want it to be clear that he is not admitting anything other than what I have stated on the record.

THE COURT: I understsnd from what you have said and what he has concurred in that he has no recollection—

MR. DIMITRIOU: That's correct.

THE COURT: —of this particular night or any of the incidents that occurred.

MR. DIMITRIOU: That's correct.

THE COURT: But what I want to make sure is that he understood that by taking a plea of guilty he will be in the same position legally as far as the power of this Court to sentence.

MR. DIMITRIOU: That's correct.

THE COURT: As though he had admitted causing her death as in the manner I spelled it out for involuntary manslaughter. That is, unintentionally as a result of a lawful or unlawful act done in a reckless or grossly negligent manner.

MR. DIMITRIOU: That's correct.

THE COURT: Do you understand, then, Dr. Gilmore, that you are pleading guilty to the charge of involuntary manslaughter?

THE DEFENDANT: Yes.

THE COURT: I wish to advise you that involuntary manslaughter is a misdemeanor of the first degree and if you plead guilty to this charge, as you've indicated you desire to do, the Court has the power to sentence you to a maximum of five years in prison and, in addition, to a maximum fine of $10,000, order you to make restitution such as might be involved and to pay the Court costs. Do you understand the maximum permissible sentence and fine which could be imposed if you plead guilty to this charge?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Dimitriou and Mr. Haddad, has there been a plea bargain agreed to in this matter?

MR. HADDAD: Your Honor, we have agreed that a pre-sentence report should be obtained and ordered and directed by the Court, that the pre-sentence report should include a full psychiatric and physical examination of the defendant and that based upon that pre-sentence report, the Commonwealth will make a recommendation at the appropriate time.

THE COURT: Now, Mr. Haddad, that's no bargain, is it? Mr. Dimitriou, do you wish to state something further?

MR. HADDAD: Just a minute, please.

(Discussion off the record.)

MR. DIMITRIOU: Your Honor, we are satisfied that with what has appeared on the record, that the plea bargain as set forth by Mr. Haddad is sufficient at this time.

THE COURT: Very well. Dr. Gilmore, have you discussed the plea bargain with your counsel?

THE DEFENDANT: Yes.

THE COURT: Do you understand it?

THE DEFENDANT: Yes.

THE COURT: Do you agree to it?

THE DEFENDANT: Yes.

THE COURT: May I see counsel at sidebar?

(Discussion off the record at sidebar.)

THE COURT: Doctor, I want you to clearly understand that I have not participated in whatever plea bargain your counsel and Mr. Haddad have negotiated and that I'm not bound by the terms of that plea bargain and that I can enter any sentence in this matter that is consistent with the law or within the ranges

that I previously mentioned to you. However, it is the law that if I do not accept the plea bargain, then you have a right to withdraw your guilty plea and stand trial. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anyone made any promises to you or in any way threatened, forced or persuaded you to plead guilty other than the plea bargain which has been mentioned?

THE DEFENDANT: (moves head horizontally)

THE COURT: You shook your head.

THE DEFENDANT: No, sir.

THE COURT: At the time you were arraigned on these charges. you stood mute and the Clerk of Court entered s plea of not guilty on your behalf. If you allow your not guilty plea to stand, you have the following rights. I'm telling you this so that you will know what it is you are giving up if you do plead guilty.

You have a right to a trial by jury or, at your request with the agreement of the Commonwealth and the consent of the Court, you may be tried by a judge without a jury. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I will now explain to you what your right to trial by jury means. A jury panel will be selected from among the registered voters and per capita taxpayers of Berks County

at random. You, with your lawyer, have a right to participate in the selection of the jury that will hear your case from among the members of the jury panel. You, with your counsel, have a right to challenge five members of the jury panel peremptorily; that is, without any reason or cause. Now, this is on the charge of involuntary manslaughter.

If you would go to trial on the other charges, which would be felonies, then you would have a right to challenge seven members of the jury panel peremptorily; that is, without any reason or cause.

You, with your lawyer, have a right to challenge any number of the members of the jury panel for cause and you, with your lawyer. may ask members of the jury panel questions so that you can determine whether or not any of them should be challenged for cause.

Once the jury has been selected to hear your case, it will consist of 12 of your fellow citizens from Berks County. That is, 12 of your equals or 12 of your peers.

These 12 citizens will hear the evidence that is presented at your trial and will determine from that evidence and only from that evidence whether you are guilty or not guilty of involuntary manslaughter as charged. In order for the jury to find you guilty of the crime charged, the jury must find each of the elements of that crime to exist beyond a reasonable doubt.

The verdict of the jury must be unanimous. That means that all 12 of the jurors must agree that you are guilty. In other words, each one of the 12 jurors must find you guilty of the crime of involuntary manslaughter before you can be found guilty of that crime.

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If you should elect to be tried before a judge without a jury and the Commonwealth and the Court should consent to that election and you would be so tried, then the judge alone would hear the evidence presented at your trial and from that evidence and only from that evidence would determine whether or not you are guilty. In order to find you guilty of involuntary manslaughter, the judge must find each of the elements of that crime charged to exist beyond a reasonable doubt.

Whether you are tried before a jury or tried before a judge without a jury, you are presumed to be innocent and the burden is at all times on the Commonwealth to prove you are guilty of this crime charged beyond a reasonable doubt.

A reasonable doubt is an honest doubt arising from the evidence, the kind of doubt that would restrain a reasonable person from acting or causing to halt or refuse to take action in a matter of the highest importance to himself so long as that doubt remained.

You have the right to confront and cross-examine Commonwealth's evidence at trial. You have a right to subpoena and call witnesses on your own behalf but you are not required to do so, and also, you have a right to testify in your own behalf if you desire but you are not required to do so. Further, if you elect not to call defense witnesses or elect not to testify in your own behalf, then your failure to call defense witnesses or your failure to testify on your own behalf cannot be used against you as any inference or evidence of your guilt.

If you stand trial and are found guilty, you have a right to file motions for a new trial and for an arrest of judgment. These are called post verdict motions or post-trial motions and are filed

after your trial. A motion for an arrest of judgment is a motion by which you ask the Court to dismiss the charges against you and to discharge you.

If you file such post-verdict motions or post-trial motions, this Court will review your trial to determine whether there were any errors of law or whether there was a miscarriage of justice which would require granting you a new trial or dismissing the charges against you.

If this Court should refuse to grant your post-verdict motions, you have a right to appeal to a higher court on the same grounds but only on the same grounds raised in this court in such motions.

You have a right to be represented by a lawyer of your own choice throughout all the proceedings that I have just mentioned, including appeals from this court to higher courts. If you cannot afford a lawyer for all or any part of those proceedings and desire a lawyer, this Court will appoint a lawyer to represent you free of charge, and if you cannot afford to pay the Court costs, we will allow you to proceed without paying the Court costs in advance.

Dr. Gilmore, do you understand all of the rights I have just explained to you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions about any of them?

THE DEFENDANT: No, sir.

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THE COURT: I advise you that if you plead guilty to the charge of involuntary manslaughter as you have indicated you desire to do, you will give up all the rights I have just explained to you including all rights to appeal to a higher court except that you will still have the following limited rights and the following limited right of appeal.

You will have a right to ask this Court for leave to withdraw your guilty plea, you will have a right to ask this Court to modify any sentence that is entered after you plead guilty, and you will have a right to appeal any sentence that is entered after you plead guilty. However, your appeal will be limited to challenging the validity of your guilty plea, to challenging the propriety of your sentence or the lawfulness of your sentence or to challenging the jurisdiction of this Court; that is, challenging the right and power of this Court to try you for the crime charged.

Do you understand that if you plead guilty, you will give up all the rights I have previously explained to you and will retain only the limited rights I have spelled out just now and the limited right to appeal as I've explained this right to you?

THE DEFENDANT: Yes, sir.

THE COURT: Dr. Gilmore, have you discussed this case and your proposed guilty plea with your defense counsel, Mr. Dimitriou?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with the services that Mr. Dimitriou has rendered to you in this case?

THE DEFENDANT: I am.

THE COURT: Do you have anything you would like to say or any question you would like to ask at this time?

THE DEFENDANT: No, sir.

THE COURT: Have you understood everything that I have asked you or told you up to this time?

THE DEFENDANT: Yes, sir.

THE COURT: Do you still desire to plead guilty to the charge of involuntary manslaughter?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Dimitriou, as counsel for Dr. Gilmore in this case, have you discussed all the matters that I've just inquired into with the defendant?

MR. DIMITRIOU: Yes, I have, Your Honor.

THE COURT: Are you satisfied that Dr. Gilmore understands what he is doing, the consequences of what he is doing and that he is doing it freely and voluntarily?

MR. DIMITRIOU: Yes, I am.

THE COURT: Dr. Gilmore, I am satisfied that after the foregoing discussion that you do desire to enter a plea of guilty to the charge of involuntary manslaughter and I am convinced that you are doing this will full understanding of the consequences

and that you are doing this freely and voluntarily. I will therefore allow you to enter a plea of guilty to the charge of involuntary manslaughter.

MR. DIMITRIOU: Your Honor, if I may, so that the record is clear, I would like the record to reflect that I have advised Dr. Gilmore that the state of the law, as the Court knows and as we have reviewed it, is that he can enter a plea of guilty without admitting guilt and it's based on the reasons that I have already spread upon the record, the Court's rulings on our pretrial motions, the fact that he does not have a recollection and that he has concluded, with my advice. that it is to his best interest to waive a jury trial or a trial before a judge and to proceed with the guilty plea of involuntary manslaughter.

THE COURT: Yes. I would re-emphasize that, Dr. Gilmore. We have reviewed the cases with counsel for the Commonwealth and with your counsel and we are satisfied under Commonwealth versus Cottrell, which is found in 433 PA 177, a 1969 case which is still good law, that in a case where there is significant evidence of guilt and where you, after adequate consultation with your lawyer, decide to plead guilty to a charge, that your plea is not rendered invalid merely because you are unable or unwilling to detail the occurrence in court or merely because you are unable to remember or have a recollection of what occurred. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand further that you will not be able to come back later and say, "I don't recall what happened and therefore my guilty plea should not be taken." Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You will be bound by tbe entry of this plea notwithstanding the fact that you say you have no recollection of what happened at the time involved. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Very well. I will allow the guilty plea to be entered. I believe the Informations are back there in the file.

Mr. Haddad, possibly before we take the plea we should ask the prosecutor in this case if he has anything he would wish to put on the record at this time.

MR. HADDAD: Your Honor, I might add prior to that time, that the plea has been discussed with Chief Harley Smith of the Muhlenberg Township Police and the prosecutor, Detective Barry Hadley and further has been reviewed with the Special Prosecutor's Office of the Attorney General of the Commonwealth of Pennsylvania and that all of the parties so mentioned have agreed to the entry of the plea as outlined to the Court this afternoon. Chief Harley Smith is here and so is Detective Barry Hadley. If they wish to add anything to that, they may do so at this time.

THE COURT: Chief Smith, do you wish to add anything for the record?

CHIEF HARLEY N. SMITH: No, Your Honor.

THE COURT: Prosecutor Hadley?

DETECTIVE BARRY HADLEY: No, sir.

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MR. HADDAD: Your Honor, I have amended the Information charging criminal homicide to read that the defendant, being advised of the offense charged in the Bill of Information and of his rights hereby, in open court, being represented by counsel, upon rearraignment, is hereby changing his plea of guilty to involuntary manslaughter, Section 3504 of the Crimes Code, date January 10, 1983.

THE COURT: Very well. The guilty plea is accepted. I'm going to direct that the probation office prepare a pre-sentence report and I would like to have a psychiatric evaluation of the defendant.

MR. DIMITRIOU: Yes, Your Honor.

MR. HADDAD: May the record reflect that the defendant and his counsel have signed the Information charging involuntary manslaughter.

MR. DIMITRIOU: That's it.

THE COURT: Very well.

MR. DIMITRIOU: I will make arrangements with the probation office, since it is after 4:00.

THE COURT: Very well. We will defer sentencing until we have the psychiatric report and the pre-sentence report.

MR. DIMITRIOU: Thank you.

(Whereupon, the proceeding was concluded at 4:12 p.m.)

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

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No. 86-498

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

IRVIN W. GILMORE,

Petitioner

v.

LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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31 pp

QUESTION PRESENTED

Whether the provisions of the double jeopardy clause preclude further state trial proceedings in a single prosecution pertaining to a multi-count information, where the trial court judge struck the accused's guilty plea to a lesser-included offense to one count of the multi-count information.

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JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1986. A petition for rehearing was denied on July 27, 1986. The Commonwealth of Pennsylvania, Respondent herein, received a copy of the petition herein on Monday, September 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a medical doctor, stands accused of the 1980 Thanksgiving Day murder of his wife. By criminal informations filed in the Court of Common Pleas of Berks County, Pennsylvania, Petitioner was charged with murder of the first degree, aggravated assault, and recklessly endangering another person. On January 10, 1983, Petitioner entered a plea of guilty to one count of involuntary manslaughter, a lesser included offense. At this hearing, in response to the court's questioning, the parties advised that the following plea agreement had been reached:

> [By Counsel for the Commonwealth]:

> Your Honor, we have agreed that a pre-sentence report should be obtained and ordered and directed by the court, that the pre-sentence report should include a full psychiatric and physical examination of the defendant, and that based upon that pre-sentence report, the Commonwealth will make a recommendation at the appropriate time.

Based upon his plea, sentencing was scheduled for February 28, 1983. At that hearing, the Commonwealth of Pennsylvania recommended a fine of $10,000 and a five-year sentence of probation/community service in lieu of imprisonment. After due consideration, the trial court stated that it would not accept the plea bargain and gave Petitioner an opportunity to withdraw his guilty plea. Petitioner, after consulting with his counsel, decided to stand on his guilty plea and was advised by the trial judge that, by so doing,

the plea became an open one, thereby permitting the judge to sentence him in accordance with the law as it deemed proper. Petitioner chose to stand on his plea. The court then stated that there were some important matters that it needed to understand. Without objection from Petitioner or his counsel, the trial judge then had Petitioner sworn and attempted to question him regarding a certain statement that he had allegedly made to a Pennsylvania State Trooper. Counsel for Petitioner objected, claiming that such a question was not relevant to the matter then before the court, to wit, the sentencing of Petitioner. The trial court judge then, pursuant to Pennsylvania Rule of Criminal Procedure 320, 42 Pa.C.S., struck Petitioner's plea and directed that a not guilty plea be

entered for Petitioner and set a date for trial.

ARGUMENT

Petitioner contends that the double jeopardy clause of the Fifth Amendment prohibits his trial on the charge of first degree murder and other related charges, when his guilty plea to a lesser-included offense in connection with the same killing was stricken by the state trial court judge. This claim has no merit and fails for the reason that Petitioner was never, in constitutional terms, placed in jeopardy for the charge of first degree murder.

The double jeopardy clause "prohibits against a second prosecution for the same offense after acquittal. It prohibits against a second prosecution for the same offense after

conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Respondent submits that none of these concerns are present in the instant matter. All charges against Petitioner are related and stem from a single killing. All charges were embraced within a single prosecution. Petitioner offered only to resolve part of the charges lodged against him by pleading guilty to the lesser included offense of involuntary manslaughter. He has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the Commonwealth of Pennsylvania had the opportunity to marshall its evidence and resources more than once or to hone its presentation of its case through a trial. See, Ohio v.

Johnson, 467 U.S. 493, 81 L.Ed.2d 425 (1984).

Although Petitioner attempted to plead guilty to the lesser-included offense of involuntary manslaughter, none of the charges which Petitioner originally faced were dismissed. They remain outstanding. The taking of a guilty plea is not the same as an adjudication on the merits after a full trial. Ohio v. Johnson, supra, n. 9. The Court of Appeals correctly stated that the interests protected by the double jeopardy clause's prohibition against successive prosecutions for the same offense are not implicated in the situation currently before us. Appendix B, 17a. This matter remains a single prosecution and is not a successive prosecution.

Although Petitioner was originally charged with first degree murder, that charge was never submitted to a trier of fact, be it judge or jury. Since Petitioner pled guilty to the lesser-included offense of involuntary manslaughter, no trier of fact was presented with a choice between first degree murder and involuntary manslaughter. It is submitted that the trial court's initial acceptance of Petitioner's plea to involuntary manslaughter cannot be interpreted as an implied rejection of criminal liability for first degree murder. Since the plea was a negotiated one, and the acceptance of the lesser degree of criminal homicide was a term of the agreement, the court did not have the option of entering a finding of a higher degree of homicide upon the plea. That the court

initially accepted the plea to involuntary manslaughter does not necessarily suggest that the evidence might not also support a higher degree of homicide.

Since Petitioner had the right to withdraw his plea if the court rejected the plea agreement, the court's acceptance of a plea to involuntary manslaughter was not an adjudication that actually resolved in Petitioner's favor, correct or not, some or all of the factual elements charged, as in Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), or in Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). In Price and Green, the proceedings were adversarial, the defendants pled not guilty, and the trials were before juries. In Green, the defendant was indicted and tried by

jury on charges of arson, first degree murder, and second degree murder. The jury found him guilty of arson and second degree murder, no specific verdict being returned on the first degree murder count. Green successfully appealed the second degree murder conviction and was awarded a new trial, at which he was tried and convicted again, this time for first degree murder under the original indictment. On appeal, this Court held that the "second trial for first degree murder placed Green in jeopardy twice for the same offense, in violation of the Constitution." Id. at 190, 78 S.Ct. at 225. This Court reasoned as follows:

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury

> refused to convict him. When given the choice between finding him guilty of either first or second degree murder, it chose the latter. In this situation, the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict, and no extraordinary circumstances appeared which prevented it from doing so. Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be re-tried for that offense.

Id. at 190-91, 78 S.Ct. at 225.

Thus, the crucial factor in Green was that the first jury was given full opportunity to find the defendant guilty of first degree murder. The jury's refusal to do so provided a logical basis for concluding that the defendant was implicitly acquitted of that offense. This rationale was reaffirmed in Price v. Georgia, supra. It is clear from the above that the sine qua non for finding implicit acquittal is failure to convict in the face of full opportunity for conviction. In the instant appeal, this factor is absent, because Petitioner pleaded guilty to the lesser-included offense of involuntary manslaughter, and the greater offense was never presented to the fact-finder.

Next, Petitioner contends that a conflict exists between Brown v. Ohio. 432 U.S. 161 (1977), and Ohio v.

Johnson, 467 U.S. 493, 81 L.Ed.2d 425 (1984). Respondent submits that no conflict exists and that Petitioner has misread these cases. The issue in Brown was whether the double jeopardy clause barred prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser-included offense of joy-riding. This Court held that the second prosecution, which was initiated by a different county of the same sovereign, was barred by the double jeopardy clause, since the defendant had been convicted and punished in a separate proceeding. In Johnson, the accused pled guilty to a lesser-included offense, thereby resolving part of the charges against him. However, the defendant's efforts were directed at disposition of a count in a single

indictment. No more than a single trial of the offenses charged was ever contemplated. Johnson was not a case of successive prosecutions or an attempt by the sovereign to extract multiple punishments for the same offenses. The factual situation in Johnson is the same as that presently before this Court, and the result should also be the same.

Petitioner's plea was stricken because the trial court found an inadequate factual basis to support it. See, Appendix G, 66a-81a. In the instant matter, Petitioner, through counsel, attempted to enter an equivocal plea of guilty, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and its Pennsylvania counterpart, Commonwealth of Pennsylvania v. Cottrell, 433 Pa. 177, 249 A.2d 294

(1969), to the lesser-included offense of involuntary manslaughter. In Alford, the Court held that the defendant's guilty plea was not constitutionally invalid because the defendant protested his innocence, so long as there was a strong factual basis for the plea. Further, in Cottrell, the Pennsylvania case upon which Petitioner relied for the position that his plea would not be rendered invalid merely because he was unable or unwilling to recall what happened, the findings are in accord with the above. In Cottrell, at 433 Pa. 179, the Pennsylvania Supreme Court stated:

> But where there is significant evidence of guilt, as there was in the present case, and the accused, after adequate consultation with his counsel, decides to plead guilty, that plea is not rendered invalid merely

> because the accused is unable or unwilling to detail the occurrence to the court.

See, also, Commonwealth v. Skurkis, 465 Pa. 257, 348 A.2d 894 (1975), allowing such a plea where there was "other substantial evidence of guilt". The trial court advised Petitioner and his counsel of the above, thereby placing them on notice that "significant evidence of guilt" was a requisite for acceptance of an Alford/Cottrell plea.

A criminal defendant does not have an absolute constitutional right to have his guilty plea accepted by a court. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Alford, supra. In addition to the requirements set forth in Alford and Cottrell, i.e., that there must be significant evidence of guilt when an

accused attempts to plead guilty when he cannot remember what has occurred, Pennsylvania Rule of Criminal Procedure 319, 42 Pa.C.S., and the guidelines set out in the Comments thereto, as well as the case law interpreting the above (Commonwealth v. Willis, 471 Pa. 50, 369 A.2d 1189 (1977); Commonwealth v. Dilbeck, 466 Pa. 543, 353 A.2d 824 (1976)), an inquiry into the following areas is mandatory:

1/ Does the defendant understand the nature of the charges to which he is pleading guilty?

2/ Is there is a factual basis for the plea?

3/ Does the defendant understand that he has the right to trial by jury?

4/ Does the defendant understand that he is presumed innocent

until he is found guilty?

5/ Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?

6/ Is the defendant aware that the judge is not bound by the terms of any plea agreement unless the judge accepts such agreement?

Failure to satisfy these minimal requirements will result in reversal. Willis, supra.

Requirement 2, above, tracks the requirement of Federal Rule of Criminal Procedure 11(f):

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The imperative of Rule 11, and of Rule 11(f), specifically, cannot be stressed too greatly. The court must satisfy itself that there is a factual basis for the plea, McCarthy v. United States, 394 U.S. 459 (1969), and this factual basis must be supported by the record, Santobello, supra.

Further, the Advisory Committee Note to the 1966 amendment to Federal Rule of Criminal Procedure 11 says, in part:

> The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

Consistent with this Note is Pennsylvania Rule of Criminal Procedure 320, 42 Pa.C.S., which provides:

> Rule 320. Withdrawal of plea of guilty. At any time before sentence, the court may, in its

> discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.

From the outset of the hearing regarding this matter, the trial court let it be known that it desired a factual background for the plea. The need for a strong factual basis for the plea was reiterated when the court discussed Petitioner's plea pursuant to Cottrell, supra, and reminded Petitioner that equivocal pleas may be accepted when there is strong evidence of guilt. Thus, it is clear that the trial court was aware of its duty under Pennsylvania law and advised Petitioner of its intention to comply with it. After rejecting the plea bargain and advising Petitioner of his options concerning his plea, the trial court stated that there were some important matters that it should understand and asked Petitioner a

question. Counsel for Petitioner objected, and the following transpired:

> THE COURT: Let me ask Dr. Gilmore. I think these are some important factors that I should understand. First, Mr. Reist, would you swear the Defendant.
>
> (Defendant is sworn.)
>
> THE COURT: Dr. Gilmore, Trooper Pease has stated in his report that you admitted to him that you gave your wife vitamin B-12 and meperidine. Do you recall making that statement to him, or do you deny making it to him, or do you admit making it to him?
>
> MR. DIMITRIOU: Your Honor, if it please the Court, I have advised Dr. Gilmore that in line with the plea as we have entered it, I don't think that those matters are relevant at this time. We have entered a plea on the record. We have stated our position on the record, and I do not believe that it is appropriate to develop into anything else other than what is pertinent at this time, which is the sentence.

THE COURT: Well, then that makes it very easy, Mr. Dimitriou. Then in accordance with Rule 320 of the Rules of Criminal Procedure, the guilty plea is struck off. A not guilty plea is entered for the Defendant, and he will stand trial. Trial is fixed for March 21, 1983.

MR. DIMITRIOU: If it please the Court, before the Court proceeds, I would like to know why the Court is taking the position that he's taking, and I would like to confer with Dr. Gilmore. I have merely stated my position. That doesn't mean that he would not respond.

THE COURT: . . .There are too many unanswered questions in this whole matter, and therefore, I think the appropriate procedure is that the matter go to trial.

* * *

THE COURT: Court is adjourned.

The trial court later issued an opinion explaining its decision to vacate the guilty plea. In that opinion, the court found an inadequate factual basis to support the defendant's equivocal guilty plea.

Thus, it was the direct actions of Petitioner which led to the striking of his guilty plea. The trial court, aware of its duty only to accept those pleas for which there was a factual basis, attempted to establish such a basis. Petitioner, by his voluntary objection, frustrated the trial court from accomplishing its duty. Thus, as a direct result of Petitioner's actions, his plea was stricken, as it had to be. Petitioner's deliberate actions terminated the trial proceeding. This behavior, Respondent submits, is analogous to those situations where a defendant,

through conscious action of his own, causes a plea to be set aside on appeal where a mistrial is granted at the request of the defendant. See, U.S. v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

Respondent submits that double jeopardy principles are not applicable in a case where the accused himself has terminated an inquiry into an element of culpability.

Finally, Petitioner claims that, because of the Circuit Court's ruling and its interpretation of Ohio v. Johnson, supra, a conflict now exists between the Circuits. In support thereof, he cites eight cases. All but one of these cases pre-date Johnson, and, in these early cases, the Circuit Courts did not have the benefit of this Court's opinion in Johnson. The Circuit

Court correctly analyzed the cases upon which Petitioner rests and found the cases either to be distinguishable from or consistent with its holding below (Appendix B, 18a-19a). Indeed, the one case that post-dates Johnson is United States v. Felton, 753 F.2d 276 (3rd Cir. 1985), which was decided a short while before the court's decision now under attack. Felton supports the proposition that a defendant whose first indictment is resolved by his guilty plea may not be tried for the same offense on a later indictment. That ruling is consistent with this Court's decision in Brown v. Ohio, supra, and is distinguishable from the facts of this case. In Felton, and in Brown v. Ohio, there were successive prosecutions, a fact not present in this matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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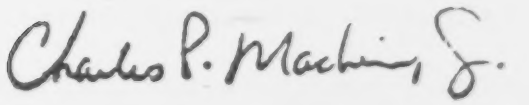

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